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No. 98-

In the

Supreme Court of the United States

October Term, 1998

STATE OF NEW JERSEY,

Petitioner,

v.

SHAWN SMITH,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR WRIT OF CERTIORARI

PETER VERNIERO
Attorney General of New Jersey
GERARD C. SIMS, JR.
Deputy Attorney General
Attorney of Record
DIVISION OF CRIMINAL JUSTICE
R.J. HUGHES JUSTICE COMPLEX
P.O. Box 086
TRENTON, NEW JERSEY 08625
(609) 292-9086

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QUESTIONS PRESENTED

1. Whether, under the totality of the circumstances test, corroboration of suspicious details by the police is a prerequisite to a finding of probable cause based on information given by a reliable informant.

2. Whether, under the totality of the circumstances test, one, or even several, prior incidents of providing accurate information are insufficient for concluding that an informant is reliable.

PARTIES BELOW

The State of New Jersey, by the Attorney General of New Jersey, is the petitioner in this case. The respondent is Shawn Smith.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

FEDERAL CONSTITUTIONAL PROVISION INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION

The State Court's Misinterpretation Of The Totality Of The Circumstances Test For Finding Probable Cause Under The Fourth Amendment Conflicts With Decisions Of This Court, United States Courts Of Appeal And The Court Of Last Resort Of Many States On A Substantial Matter of Federal Constitutional Law 7

A. The State Court Erred In Holding That The Corroboration Of Suspicious Details Given By An Informant Is A Prerequisite To The Finding Of Probable Cause Under

The Totality Of The Circumstances Test 8

B. The State Court Erred In Finding That One, Or Even Several, Prior Instances Of Providing Reliable Information, Is Insufficient To Establish An Informant's Reliability Under The Totality Of The Circumstances Test 15

C. The State Court's Decision Conflicts With Decisions of This Court, United States Courts Of Appeal And State Courts Involving Very Similar Facts 19

CONCLUSION 24

APPENDICES:

APPENDIX A OPINION AND JUDGMENT OF THE SUPREME COURT OF NEW JERSEY, filed July 16, 1998

APPENDIX B OPINION AND JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, filed June 14, 1996

APPENDIX C TRANSCRIPT OF PROCEEDINGS, UNION COUNTY INDICTMENT NO. 93-7-00922 on October 4, 1994

TABLE OF AUTHORITIES

CASES CITED: **Page**

Aguilar v. Texas, 378 U.S. 108 (1964) 7,11 15

Arizona v. Evans, 514 U.S. 1 (1995) 2

Brinegar v. United States, 338 U.S. 160 (1949) 9

Commonwealth v. Jones, 668 A.2d 114 (Pa. 1995) 12

Crawford v. State, ___S.E.2d___, 1998 WL 325133, *4 (Ga.App. 1998) 11

Draper v. United States, 358 U.S. 312 (1959) 13

Illinois v. Gates, 462 U.S. 213 (1983) . . . . . passim

Illinois v. Rodriguez, 497 U.S. 177 (1990) 2

Jaggers v. State, 687 N.E.2d 180 (Ind. 1997) 11

Jefferson v. United States, 476 A.2d 685 (D.C. 1984) 9,14 22

Jones v. State, 481 So.2d 798 (Miss. 1985) 11

Jones v. United States, 362 U.S. 257 (1960) 13,15 21

Massachussets v. Upton, 466 U.S. 727 (1984) 9,10 13

McCray v. Illinois, 386 U.S. 300 (1967) 8,15 20,24

Michigan v. Long, 463 U.S. 1032 (1983) 2

Ohio v. Robinette, 519 U.S. 33, 117 S.Ct. 417 (1996) 2

Ornelas v. United States, 517 U.S. 690 (1996) 20

Pattman v. State, 431 S.E.2d 706 (Ga. Ct. App. 1993) 23

People v. Darden, 34 N.Y.2d 177, 313 N.E.2d 49 (1974) 23

People v. DiFalco, 610 N.E.2d 352 (N.Y. 1993) 14

People v. Faucett, 499 N.W.2d 764 (Mich. 1993) 14

People v. Fortune, 930 P.2d 1341 (Colo. 1997) 12

People v. Paquin, 811 P.2d 394 (Colo. 1991) 11,16

People v. Rahming, 795 P.2d 1338 (Colo. 1990) 14

People v. Tisler, 469 N.E.2d 147 (Ill. 1984) 9,14

Reid v. Georgia, 448 U.S. 438 (1980) 13

Schmid v. State, 615 P.2d 565 and n.14 (Alaska 1980) 14,15

Spinelli v. United States, 393 U.S. 410 (1969) 7,15 19

State v. Alger, 603 P.2d 1009 (Idaho 1979) 14

State v. Baker, 389 So.2d 1289 (La. 1980) 14

State v. Bell, 482 So.2d 11 (La. Ct. App. 1985) 23

State v. Butler, 655 So.2d 1123 (Fla. 1995) 14,21

State v. Combs, 398 N.W.2d 563 (Minn. 1987) 14

State v. Comeau, 321 A.2d 590 (N.H. 1974) 12

State v. Goyette, 594 A.2d 432 (Vt. 1991) 14

State v. Hasenbank, 425 A.2d 1330 (Me. 1981) 23

State v. Ortiz, 609 A.2d 921 (R.I. 1992) 14

State v. Poole, 871 P.2d 531 (Utah 1994) 14

State v. Richardson, 456 N.W.2d 830 (Wis. 1990) 14

State v. Robinson, 342 So.2d 183 (La. 1977) 23

State v. Romano, 332 A.2d 64 (Conn. 1973) 11

State v. Smith, 155 N.J. 83, 713 A.2d 1033 (1998) 2

State v. Smith, 291 N.J. Super. 245, 677 A.2d 250 (App. Div. 1996) 1

State v. Walston, 768 P.2d 1387 (Mont. 1989) 11

State v. Zachodni, 466 N.W.2d 624 (S.D. 1991) 14

State v. Zutic, 713 A.2d 1043 (1998) 2,12

Thomas v. State, 430 S.E.2d 849 (Ga. Ct. App. 1993) 23

Turner v. United States, 588 A.2d 280 (D.C. 1991) 22

United States v. Abadie, 879 F.2d 1260 (5th Cir.), *cert. denied*, 493 U.S. 1005 (1989) 23

United States v. Angulo-Lopez, 791 F.2d 1394 (9th Cir. 1986) 14,16

United States v. Ayers, 924 F.2d 1468 (9th Cir. 1991) 23

United States v. Blount, 123 F.3d 831 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 1101 (1998) 11

United States v. Brown, 49 F.3d 1346 (8th Cir. 1995) 12,14

United States v. Bruner, 657 F.2d 1278 (D.C. Cir. 1981) 16

United States v. Cserna, 110 F.3d 70 (9th Cir. 1997) 14

United States v. Dawkins, 17 F.3d 399 (D.C. Cir. 1994) 9,14

United States v. Decoteau, 932 F.2d 1205 (7th Cir. 1991) 11

United States v. Finch, 998 F.2d 349 (6th Cir. 1993) 12

United States v. Herrera, 711 F.2d 1546 9

United States v. Khounsavanh, 113 F.3d 279 (1st Cir. 1997) 10,11

United States v. Lalor, 996 F.2d 1578 (4th Cir. 1993), *cert. denied*, 510 U.S. 983 (1993) 14

United States v. Laury, 985 F.2d 1293 (5th Cir. 1993) 16

United States v. Lincoln, 992 F.2d 356 (D.C. Cir. 1992) 9,23

United States v. Marbury, 732 F.2d 390 (5th Cir. 1984) 9,23

United States v. Marin, 761 F.2d 426 (7th Cir. 1985) 14

United States v. Marino, 682 F.2d 449 (3d Cir. 1982) 11,16

United States v. Mendoza, 722 F.2d 96 (5th Cir. 1983), *reh'g denied*, 727 F.2d 448 (5th Cir. 1984) 14

United States v. Michaelian, 803 F.2d 1042 (9th Cir., 1986) 11

United States v. Morales, 923 F.2d 621 (8th Cir. 1991) 14

United States v. Ramos, 818 F.2d 1392 14

United States v. Respress, 9 F.3d 483 (6th Cir. 1993) 14

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United States v. Rucker, 138 F.3d 697 (7th Cir. 1998) 16,22

United States v. Sokolow, 490 U.S. 1 (1989) 10,13

United States v. Sumpter, 669 F.2d 1215 (8th Cir. 1982) 11

United States v. White, 648 F.2d 29 (D.C. Cir.), *cert. denied*, 454 U.S. 924 (1981) 24

United States v. Zayas-Diaz, 95 F.3d 105 (1st Cir. 1996) 10

Washington v. Chrisman, 455 U.S. 1 (1982) 2

STATUTES CITED

28 U.S.C. 1257(a) 2

N.J. Stat. Ann. §2C:35-5(b)(3) 5

N.J. Stat. Ann. §2C:35-7 5

N.J. Stat. Ann. §2C:35-10(a)(1) 5

RULES CITED

Sup. Ct. R. 10(b) 8

Sup. Ct. R. 10(c) 8

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

The Attorney General of New Jersey, on behalf of the State of New Jersey, respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the Supreme Court of New Jersey entered in this case on July 16, 1998.

OPINIONS BELOW

The opinion of the Superior Court of New Jersey, Appellate Division, is reported at 291 N.J. Super. 245, 677 A.2d 250 (App. Div. 1996), and is reprinted as Appendix B, p. 19a-31a, *infra*.

The opinion of the Supreme Court of New Jersey is reported at 155 N.J. 83, 713 A.2d 1033 (1998), and is reprinted as Appendix A, p. 1a-18a, *infra*.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Supreme Court of New Jersey, dated July 16, 1998, is invoked under 28 U.S.C. 1257(a). The portion of the opinion of the Supreme Court of New Jersey to which *certiorari* is sought does not give a "plain statement" of the existence of independent and adequate state grounds upon which the decision rests. *See Ohio v. Robinette*, 519 U.S. 33, ___, 117 S.Ct. 417, 420 (1996); *Arizona v. Evans*, 514 U.S. 1, 7-9 (1995); *Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990); *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983); *Washington v. Chrisman*, 455 U.S. 1, 5 n.2 (1982). To the contrary, the state supreme court opinion expressly indicated its reliance on federal constitutional law by stating that "[t]he State's constitutional standard parallels that of the United States Constitution." (App. A at 6a). The opinion further states that New Jersey has adopted the "totality of the circumstances" test as set forth in *Illinois v. Gates*, 462 U.S. 213 (1983). (App. A at 7a). Repeatedly citing federal precedent, the court thereafter proceeded to decide the case based on its mistaken interpretation of that standard. (App. A at 7a-15a). Indeed, in another case decided the same day, *State v. Zutic*, 713 A.2d 1043 (1998), the court specifically stated that the case was "governed" by the totality of the circumstances test from *Illinois v. Gates*, *supra*, and "[w]e apply that test here in the same manner as we did in *Smith*...." *State v. Zutic*, 713 A.2d at 1047.

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The undisputed facts developed at the suppression hearing conducted before the state trial court, and set forth in the opinion of the Supreme Court of New Jersey, App. A at 2a-5a and that of the Superior Court of New Jersey, Appellate Division, App. B at 20a-22a, are as follows. On February 23, 1993 at 3:20 p.m., Detective Robert Hilongos of the Elizabeth Police Department received a call from an informant whom he considered to be reliable. The informant had provided accurate information on one occasion in the past which had resulted in a conviction.

The informant stated that a black male wearing a three quarter length jacket and a yellow cap was selling narcotics "out of the lobby of 400 Irvington Avenue." Indeed, he was selling the drugs as they spoke. The informant explained that the man would take the orders in the lobby of the building and then retrieve the drugs from apartment 2L in the building and bring them to the lobby. The informant further declared that the man was also "using a red Datsun two-door with New Jersey registration HIO33D, that was parked across the street from 400 Irvington Avenue."

The neighborhood surrounding 400 Irvington Avenue is known as a "high narcotic trafficking area." Detective Hilongos himself had executed several search warrants in the apartment complex where 400 Irvington Avenue is located.

Within a few minutes, Hilongos and four other officers responded to the scene. Hilongos observed a black male wearing a three quarter length jacket and a yellow cap walking along the sidewalk by 400 Irvington Avenue, about 50 to 60 feet from the entrance to the building. The man was later identified as respondent Shawn Smith, (hereinafter defendant). Because of the physical layout of the area and the building, it was not possible to engage in a surveillance. Defendant was stopped and searched. A set of keys, later determined to be for apartment 2L, was found on his person.

While defendant was detained downstairs by the other officers, Hilongos went to apartment 2L and knocked on the door. There was no response, but Hilongos was approached by Andrea Smith who lived next door. Andrea stated that 2L was the apartment of her sister, Stacy Walker. Andrea further stated that Walker was in the hospital. Another neighbor, Patricia Wright, telephoned Walker at the hospital.

Prior to speaking with Hilongos, Walker spoke with Kathy Ryan, the building manager. Ryan told Walker that a detective wanted her permission to search her apartment. Ryan also told her that she had the right to refuse her consent, but that if she did, the police would seek a search warrant. Ryan also reassured Walker that she would not be evicted if she refused to consent to the search. Hilongos then spoke with Walker and asked for her consent to search the apartment. Without any threats or inducements, Walker consented to the search.

After receiving Walker's permission, Hilongos searched the apartment. During the course of the search, 59 vials of

cocaine were found in the refrigerator. Defendant was then formally placed under arrest.

On July 1, 1993, defendant was indicted for possession of a controlled dangerous substance, in violation of *N.J. Stat. Ann.* §2C:35-10(a)(1) (count one); possession of a controlled dangerous substance with intent to distribute, in violation of *N.J. Stat. Ann.* §2C:35-5(b)(3) (count two) and possession of a controlled dangerous substance with intent to distribute within 1,000 feet of a school, in violation of *N.J. Stat. Ann.* §2C:35-7 (count three).

Defendant's motion to suppress evidence was denied by the Superior Court of New Jersey, Law Division. That court held that, based on the informant information received by Detective Hilongos which was corroborated, the police had an "articulable, reasonable basis for suspicion" which justified their detention of defendant. The court further found that Walker's consent to search her apartment was knowing and voluntary.

Based on that consent, the court held that the discovery of the cocaine was lawful. While the court considered the initial seizure of the keys from defendant's person to be an unlawful search, it found that the keys would have been inevitably discovered after location of the cocaine and defendant's subsequent arrest. Finally, the court held that defendant was "a trespasser and probably a burglar...." Accordingly, he had no reasonable expectation of privacy in anything he brought into Walker's apartment.

Based on the foregoing, the court denied defendant's motion to suppress both the keys and the drugs. Later that same day, defendant pled guilty to count three of the indictment, possession of a controlled dangerous substance with intent to distribute within 1,000 feet of a school, in violation of *N.J.S.A.* 2C:35-7.

The Superior Court of New Jersey, Appellate Division, in an unanimous opinion, affirmed the denial of defendant's motion to suppress. That court concluded that, based on the information provided by a reliable informant which was corroborated by the police, there was probable cause to arrest defendant. The search of defendant which led to discovery of the keys was therefore lawful as being incident to the arrest. App. B at 22a-28a.

The court further held that the search of the apartment was lawful. This conclusion was based on two separate premises. First, the search was pursuant to voluntary consent given by the tenant of the apartment. App. B at 28a-30a. Second, in any event, the motion was properly denied because defendant had no reasonable expectation of privacy in the apartment because he was a trespasser on that property. App. B at 30a-31a.

On July 16, 1998, the Supreme Court of New Jersey, in a 4-3 decision, reversed the lower courts and granted defendant's motion to suppress both the keys and the drugs. The Court held that the informant information received by the police, and the officers' subsequent actions, were insufficient to satisfy the totality of the circumstances test and establish probable cause justifying the warrantless arrest of defendant. That declaration eliminated the justification for the search of defendant which produced the keys to apartment 2L. App. A at 5a-15a.

The court further held that, despite the tenant's consent to search, the search for the drugs was the unlawful fruit of the poisonous tree. According to the court, the tenant's knowledge that the police had found the keys to her apartment on defendant's person improperly influenced her decision to give her consent. App. A at 15a-16a. The court did not consider it necessary to determine whether, as a tresspasser, defendant had standing to assert a privacy interest in the drugs. Rather, the court concluded that defendant's standing

flowed from the initial unlawful search and the consequent violation of his rights. App. A at 16a-17a.

The three dissenters stated that they would have affirmed the judgment below "substantially for the reasons expressed in the opinion of the Appellate Division...." App. A at 18a.

REASONS FOR GRANTING THE PETITION

The State Court's Misinterpretation Of The Totality Of The Circumstances Test For Finding Probable Cause Under The Fourth Amendment Conflicts With Decisions Of This Court, United States Courts Of Appeal And The Court Of Last Resort Of Many States On A Substantial Matter of Federal Constitutional Law.

The instant case presents important law enforcement issues regarding the nature and requirements of the totality of the circumstances test used for evaluating the existence of probable cause under the Fourth Amendment. In *Illinois v. Gates*, 462 U.S. 213 (1983), this Court rejected the inflexible *Aguilar/ Spinelli*[1] test for finding probable cause in favor of the broader "totality of the circumstances" test. The New Jersey Supreme Court's decision, in turn, rejects the flexibility of the totality of the circumstances test and reimposes additional inflexible restrictions. Thus, according to that court, independent police corroboration of an informant's details is now a separate prong of the test which must be rigidly enforced regardless of the variety of other factors present in the totality of the circumstances. Compounding the problem is the New Jersey court's holding that such corroboration must be of suspicious, and not innocent or neutral, details, as permitted by this Court. The

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[1] *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969).

state court has also dramatically increased the level of evidence which must be presented to establish an informant's reliability.

"...[T]he informer is a vital part of society's defensive arsenal." *McCray v. Illinois*, 386 U.S. 300, 307 (1967). Moreover, the facts of the present case are typical of those faced on a daily basis by police officers around the country. It is therefore plainly fundamental that police officers be given proper guidance from the courts in the handling of informant tips in such circumstances. Consequently, the state court's misinterpretation of the totality of the circumstances test herein could have an enormous negative impact on law enforcement's ability to protect the security of our citizens, and on the war on drugs in particular, not only in New Jersey, but across the country. These changes represent such a dramatic departure from the flexible "totality of the circumstances" approach taken by this Court, United States courts of appeal and the court of last resort of many states, that a grant of certiorari is necessary for this Court to clarify the applicable law. *See* Sup. Ct. R. 10(b) & (c).

A. The State Court Erred In Holding That The Corroboration Of Suspicious Details Given By An Informant Is A Prerequisite To The Finding Of Probable Cause Under The Totality Of The Circumstances Test.

In *Illinois v. Gates*, 462 U.S. 213 (1983), this Court observed the inflexible manner in which lower courts had come to apply the *Aguilar-Spinelli* test. The *Gates* Court explained that it never had intended the rigid compartmentalization that had developed around that standard. *Id.* at 229-30 & n. 6. The Court expressly rejected an unyielding application of the two-part *Aguilar-Spinelli* test and adopted in its stead a new, more flexible gauge for evaluating the existence of probable cause based on an informant's tip; a test that views the "totality of the

circumstances." *Id. at 231-32*; *Massachussets v. Upton*, 466 U.S. 727, 732 (1984); *United States v. Marbury*, 732 F.2d 390, 395 (5th Cir. 1984); *United States v. Herrera*, 711 F.2d 1546, 1555 n. 14 (11th Cir. 1983); *Jefferson v. United States*, 476 A.2d 685, 686 (D.C. 1984); *People v. Tisler*, 469 N.E.2d 147, 154 (Ill. 1984).

Under that standard, probable cause is viewed as a "practical, nontechnical concept," *Brinegar v. United States*, 338 U.S. 160, 176 (1949), "turning on the assessment of probabilities in particular factual contexts -- not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. at 232.[2]

> Among others, the factors that may contribute to a "probable cause" determination include whether an affidavit supports the probable "'veracity' or 'basis of knowledge' of persons supplying hearsay information"; whether informant statements are self-authenticating; whether some or all the informant's factual statements were corroborated wherever reasonable and practicable (e.g., through police surveillance); and whether a law-enforcement affiant included a professional assessment of the probable significance of the facts related by the informant, based on experience or expertise. None of these factors is indispensable; thus, stronger evidence on one or more factors may

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[2] The same general standards apply in determining probable cause, whether it is to arrest or to search. *United States v. Dawkins*, 17 F.3d 399 (D.C. Cir. 1994); *United States v. Lincoln*, 992 F.2d 356, 358 (D.C. Cir. 1992); 2 Wayne R. LaFave, Search and Seizure: A Treatise on The Fourth Amendment (3d ed. 1996), §3.1(b) at 6-8 . Therefore, for present purposes, cases addressing the existence of probable cause are relevant regardless of whether such case arose from a search or an arrest.

> compensate for a weaker or deficient showing on another.

United States v. Zayas-Diaz, 95 F.3d 105, 111 (1st Cir. 1996) (citations and footnote omitted) (emphasis added). *Accord Massachussets v. Upton*, 466 U.S. at 730-31; *Illinois v. Gates*, 462 U.S. at 233; *United States v. Khounsavanh*, 113 F.3d 279, 284 (1st Cir. 1997). *See United States v. Sokolow*, 490 U.S. 1, 9 (1989) .

As can be seen from the above, the totality of the circumstances test requires that all of the various facts present in a situation be considered in determining the existence of probable cause, but that no one of them is "indispensable." In the instant case, however, the New Jersey Supreme Court has ignored that fundamental aspect of this flexible test. Instead, it asserts that corroboration is an independent prong which must be satisfied in each case. As stated in the opinion below,

> Because the information contained in an informant's tip is hearsay and must be invested with trustworthiness to be considered as probative evidence, corroboration is an essential part of the determination of probable cause. Independent corroboration is necessary to ratify the informant's veracity and validate the truthfulness of the tip.

App. A. at 10a (emphasis added).

While defendants have often argued that corroboration of an informant's tip by the police is a per se requirement to establish probable cause, that assertion has been consistently rejected by the courts of this country. As stated by Professor LaFave, "Of the questions which might be put... perhaps the easiest is that of whether some form of corroboration is essential to a finding of probable cause based primarily upon information from an informant. The answer is no...." 2

Wayne R. LaFave, Search and Seizure: A Treatise on The Fourth Amendment (3d ed. 1996), §3.3(f) at 166 (emphasis added). LaFave based that conclusion on various lower court rulings and the fact that in setting forth the two prong test in *Aguilar v. Texas*, *supra*, this Court did not establish corroboration as a prerequisite to the finding of probable cause. *Id.* at 167.

As explained by the Supreme Court of Colorado,

> While police corroboration of significant aspects of an informant's tip is an important factor in the probable-cause calculus, it is not an indispensable component of the probable-cause determination. Rather, what is critical under the totality-of-the-circumstances test is that there be a substantial basis in the affidavit itself for the issuing judge's determination that there are reasonable grounds to believe that contraband or other incriminating evidence will be found at the place to be searched. Such substantial basis, as previously discussed, is not inexorably tied to any one element, nor is any single element a sine qua non of the probable-cause determination.

People v. Paquin, 811 P.2d 394, 398 (Colo. 1991) (citations ommitted). *Accord United States v. Blount*, 123 F.3d 831, 836 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 1101 (1998); *United States v. Khounsavanh*, 113 F.3d at 284; *United States v. Decoteau*, 932 F.2d 1205, 1207 (7th Cir. 1991); *United States v. Michaelian*, 803 F.2d 1042, 1045 (9th Cir., 1986); *United States v. Marino*, 682 F.2d 449, 453 (3d Cir. 1982); *United States v. Sumpter*, 669 F.2d 1215, 1219 (8th Cir. 1982); *State v. Romano*, 332 A.2d 64, 67 (Conn. 1973); *Crawford v. State*, ___S.E.2d___, 1998 WL 325133, *4 (Ga.App. 1998); *Jaggers v. State*, 687 N.E.2d 180, 183 (Ind. 1997); *Jones v. State*, 481 So.2d 798, 800 (Miss. 1985); *State v. Walston*, 768 P.2d 1387, 1390 (Mont. 1989); *State v.*

Comeau, 321 A.2d 590, 592 (N.H. 1974); *Commonwealth v. Jones*, 668 A.2d 114, 117 (Pa. 1995) ("To require corroboration in every situation would be contrary to the purpose of the totality of circumstances test: allowing a flexible, common sense approach to all the circumstances of an affidavit"). *See United States v. Brown*, 49 F.3d 1346, 1349 (8th Cir. 1995); *United States v. Finch*, 998 F.2d 349, 352 (6th Cir. 1993); *People v. Fortune*, 930 P.2d 1341, 1345 (Colo. 1997) and cases cited therein.

Compounding the problem, the New Jersey Supreme Court held not only that police corroboration was "necessary," but that it must be of "suspicious" details. According to that court, corroboration of innocent or neutral aspects of the informant's tip is irrelevant in determining the existence of probable cause.

> Moreover, the police corroboration did not include the observation of any suspicious drug transaction or criminal activity. The police corroboration only of the suspect's description and location did not bolster the tip's reliability or add to its weight....See *Zutic*, *supra*, [713 A.2d 1043, 1048].

App. A at 13a-14a.

The Court's citation to *State v. Zutic*, 713 A.2d 1043 (1998), decided the same day, is significant because at the page referred to, the New Jersey court held,

> ...police corroboration here was of purely non-suspicious detail; without the corroboration of suspicious detail there can be no inference that defendant was engaged in criminal activity.

Id. at 1048 (emphasis added). Thus, it is clear that, according to the New Jersey Supreme Court, police

corroboration of innocent, neutral or non-suspicious detail is of no moment in the probable cause equation.

In *Illinois v. Gates*, 462 U.S. 213, the Illinois Supreme Court had similarly held that "the corroboration of innocent activity," was insufficient to support a finding of probable cause. However, this Court expressly rejected that position, stating,

> innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens demands....In making a determination of probable cause the relevant inquiry is not whether particular conduct is "innocent" or "guilty," but the degree of suspicion that attaches to particular types of non-criminal acts.

Id. at 243 n 13. *Accord United States v. Sokolow*, 490 U.S. at 9; *Massachussets v. Upton*, 466 U.S. at 732; *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (per curiam); *Jones v. United States*, 362 U.S. 257, 270-71 (1960). *See Draper v. United States*, 358 U.S. 312-13 (1959); LaFave §3.3(f) at 168 ("Although it has been suggested '[o]nly corroboration of an incriminating allegation should be relevant', this strict view has not prevailed").

The United States courts of appeal also have repeatedly held that corroboration of innocent details can help to establish probable cause. As stated by the Eighth Circuit,

> This court has repeatedly stated that the presence of probable cause does not depend on the verification of illicit or even furtive activity; the 'corroboration of minor, innocent details can suffice to establish probable cause'.

United States v. Morales, 923 F.2d 621, 625 (8th Cir. 1991) (emphasis added). *Accord United States v. Cserna*, 110 F.3d 70 n.1 (9th Cir. 1997); *United States v. Brown*, 49 F.3d 1346, 1349 (8th Cir. 1995); *United States v. Dawkins*, 17 F.3d 399, 404 (D.C. Cir. 1994); *United States v. Respress*, 9 F.3d 483, 488 n.5 (6th Cir. 1993); *United States v. Lalor*, 996 F.2d 1578, 1581 (4th Cir. 1993), *cert. denied*, 510 U.S. 983 (1993); *United States v. Ramos*, 818 F.2d 1392. 1397 n. 7 (8th Cir. 1987); *United States v. Reyes*, 792 F.2d 536, 539 (5th Cir.), *cert. denied*, 479 U.S. 855 (1986); *United States v. Angulo-Lopez*, 791 F.2d 1394, 1397-98 (9th Cir. 1986); *United States v. Marin*, 761 F.2d 426, 432 (7th Cir. 1985); *United States v. Mendoza*, 722 F.2d 96, 101 (5th Cir. 1983), *reh'g denied*, 727 F.2d 448 (5th Cir. 1984).

The highest courts of many states have also so held. *Schmid v. State*, 615 P.2d 565, 576-77 and n. 14 (Alaska 1980); *People v. Rahming*, 795 P.2d 1338, 1341 (Colo. 1990); *Jefferson v. United States*, 476 A.2d 685, 686 (D.C. 1984); *State v. Butler*, 655 So.2d 1123, 1125 (Fla. 1995); *State v. Alger*, 603 P.2d 1009, 1012 (Idaho 1979); *People v. Tisler*, 469 N.E.2d at 159; *State v. Baker*, 389 So.2d 1289, 1293 (La. 1980); *People v. Faucett*, 499 N.W.2d 764, 774 (Mich. 1993); *State v. Combs*, 398 N.W.2d 563, 565 (Minn. 1987); *People v. DiFalco*, 610 N.E.2d 352, 355 (N.Y. 1993); *State v. Ortiz*, 609 A.2d 921, 926 (R.I. 1992); *State v. Zachodni*, 466 N.W.2d 624, 630 (S.D. 1991); *State v. Richardson*, 456 N.W.2d 830, 835, (Wis. 1990); *State v. Poole*, 871 P.2d 531, 535 (Utah 1994); *State v. Goyette*, 594 A.2d 432, 435 (Vt. 1991).

Indeed, the Supreme Court of Alaska opined,

> We believe that requiring the police to verify an incriminating fact before corroboration can be used to demonstrate the reliability of an informant would severely limit the use of informants to provide probable cause. We are reluctant to restrict the

> police in this area and thereby discourage warrant applications in the absence of a good rationale....

Schmid v. State, 615 P.2d at 576-77. Despite this plethora of precedent, the New Jersey Supreme Court incorrectly held that corroboration of innocent or neutral aspects of the informant's tip was irrelevant in determining the existence of probable cause. App. A at 13a-14a.

Plainly, the holdings of the New Jersey Supreme Court a) that corroboration is an independent and "necessary" prong of the totality of the circumstances test which must be satisfied in each case, and b) that such corroboration cannot be of innocent details, but is restricted to suspicious actions, are wrong. They conflict with the law of both this Court and that of the vast majority of courts of this country. Indeed, those rulings, involving such significant federal issues, should not be permitted to muddy the waters of jurisprudence in this area. Accordingly, certiorari should be granted.

B. The State Court Erred In Finding That One, Or Even Several, Prior Instances Of Providing Reliable Information, Is Insufficient To Establish An Informant's Reliability Under The Totality Of The Circumstances Test.

This Court has found that an application for a search warrant is deficient if the affiant baldly recites that the informant is a credible or reliable person. *Illinois v. Gates*, 462 U.S. at 239; *Spinelli v. United States*, 393 U.S. 410, 415 (1969); *Aguilar v. Texas*, 378 U.S. 108, 114 (1964). However, an affiant's explanation setting forth the facts supporting a claim that an informant has previously provided reliable information is sufficient. *McCray v. Illinois*, 386 U.S. 300, 304 (1967); *Jones v. United States*, 362 U.S. 257, 271 (1960). Indeed, in *Illinois v. Gates*, 462 U.S. at 232 n. 7, this Court noted with approval that in *Jones v. United*

States, *supra*, the Court found an informant to be reliable based on only one prior occasion of reliability.

The majority of lower courts "have followed the example of *Jones* in permitting magistrate reliance on a recital that the informant had previously given correct information...." *United States v. Bruner*, 657 F.2d 1278, 1297 (D.C. Cir. 1981). Indeed, as stated by Professor LaFave,

> Lower courts have with virtual unanimity held that a declaration that the informant's past information has led to conviction is a sufficient showing of the informer's credibility....[E]ven the giving of information on a single past occasion has been deemed sufficient when that information brought about an arrest and a conviction of the individual arrested....[Moreover] [c]ourts have consistently held that an informant's track record is sufficiently established by a showing (i) that on one or more occasions the informer indicated that a certain object, usually narcotics...are concealed at a certain place.

LaFave, *supra*, §3.3(b) at 106-08 (emphasis added). *See United States v. Rucker*, 138 F.3d 697, 700 (7th Cir. 1998); *United States v. Laury*, 985 F.2d 1293, 1312 (5th Cir. 1993); *United States v. Angulo-Lopez*, 791 F.2d 1394, 1397 (9th Cir. 1986); *United States v. Marino*, 682 F.2d 449, 453 (3d Cir. 1982); *People v. Paquin*, 811 P.2d 394 (Colo. 1991).

Professsor LaFave further notes that there is a "substantial body of authority" holding that the mere assertion in an affidavit that an informant has "proven reliable in the past" is sufficient to establish the informant's credibility. LaFave, *supra*, §3.3(b) at 113-14. If such a general statement is acceptable to establish reliability, then a fortiori, a specific statement that the informant had previously

provided information leading to a conviction, should be sufficient to establish the informant's reliability.

Despite this clear line of precedent that the provision of correct information on a prior occasion leading to a conviction is sufficient to establish an informant's reliabilty, the New Jersey Supreme Court found that same evidence inadequate in the case sub judice. The court acknowledged that, "[u]nder *Aguilar/Spinelli*, a single instance of past reliability would have been sufficient evidence of the veracity factor." App.A at 11a (emphasis added). However, without explanation or citation, the court indicated that that degree of prior reliability was no longer sufficient under the totality of the circumstances test. App.A at 8a, 11a. In fact, the court stated that even "a few past instances of reliability" may not establish an informant's reliability. App A at 8a. Rather, the court insisted that it wanted more information as to the informant's "history or motives," although there was nothing in the record below to call into question the informant's motives. App A at 11a.[3]

As can be seen from the above, the instant case presents several important federal issues for this court to resolve. First, the New Jersey court indicated that the degree of evidence required concerning the reliability of an informant is now more demanding under the totality of the circumstances test than it was under the *Aguilar/Spinelli* standard. App.A at 8a, 11a. Is that assertion correct? Did this Court intend that the totality of the circumstances test should be more demanding than were the dictates of *Aguilar/Spinelli*? *See* LaFave, *supra*, §3.3(d) at 141 (the totality of the circumstances test is "seemingly less demanding" than *Aguilar/Spinelli)*.

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[3]Of course, it goes without saying that the more details revealed about an informant's history and possible motives, the greater the risk that the identity of the informant will be revealed.

Second, this Court, and numerous lower courts, have indicated that the furnishing of correct information on one or more prior occasions is sufficient to establish an informant's reliabilty. The New Jersey Supreme Court, however, stated that even several prior instances of providing accurate information may not establish an informant's credibility. App.A at 8a. That court also appears to require an examination of the possible motives of an informant. App.A at 11a. These determinations constitute a significant departure from existing law and are in conflict with decisions of this Court, United States courts of appeals and the court of last resort of various states. Plainly, this Court should address these significant issues.

Finally, as noted above, there is a substantial body of caselaw concluding that an affiant's assertion that an informant has "proven reliable in the past" is adequate to establish the informant's reliability. Plainly, the New Jersey Supreme Court rejected that position in its decision below. Moreover, there are a number of other decisions, including those of United States courts of appeal and the court of last resort of several states, holding that such language is too conclusory and therefore does not substantiate the informant's credibility. *See* LaFave, supra, §3.3(b) at 114 n. 108 and the cases cited therein. It is respectfully submitted that this Court should undertake to address this morass of conflicting decisions and determine this very important issue. The case at bar clearly presents this Court an opportunity to resolve, or at least shed light upon, that question, as well as the other issues discussed above. For these reasons, certiorari should be granted in the instant case.

C. The State Court's Decision Conflicts With Decisions of This Court, United States Courts Of Appeal And State Courts Involving Very Similar Facts.

The existence of probable cause to arrest defendant in the case sub judice was nothing less than patent. First, the police received detailed information from an informant who had proven reliable in the past. Second, the informant's basis of knowledge was current first-hand information based on the informant's personal observations. This fact could well be inferred from the informant's statement that the drug sales were occurring at that time of the report. App. A at 11a; App. B at 20a, 27a. The informant's detailed description of defendant's appearance and actions also led the Superior Court of New Jersey, Appellate Division, to find that "in all likelihood only one conversant with the criminal activity would know" those details. App. B. at 27a. *See Spinelli v. United States*, 393 U.S. 410, 416 (1969).

Third, the police corroborated the various particulars provided by the informant. Upon arriving at the specified location, the police confirmed the facts given by the informant that the person specified was 1) male, 2) African-American, 3) located at 400 Irvington Avenue, 4) apparently using the lobby of that building, 5) wearing a black three-quarter length coat and a yellow hat and 6) using a red two-door Datsun, license plate number HIO33D, that was parked across the street from 400 Irvington Avenue.[4]

Finally, based on the above corroborated facts, and their extensive experience with narcotics and the prevalence of

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[4]The informant also stated that defendant was selling the drugs in the apartment house lobby, but kept them stored in Apartment 2L. The location of the drugs was not confirmed, however, until after defendant's arrest.

narcotics in that neighborhood,[5] indeed that very building complex, the officers involved reached a reasonable conclusion that there was probable cause to arrest defendant. It is thus plain that the three dissenters in the case below were, in fact, correct in their desire to affirm the Appellate Division's unanimous finding of probable cause to arrest defendant and to conduct a search of his person incident to his arrest.

The erroneous nature of the majority ruling below clearly can be seen when it is compared to other cases containing analogous facts. For example in *McCray v. Illinois*, 386 U.S. 300 (1967), this Court faced a very similar situation. In that case, a reliable informant reported to the police that, based on his observations, McCray "was selling narcotics and had narcotics on his person and that he could be found in the vicinity of 47th and Calumet at this particular time." *Id.* at 302. The police immediately drove to that vicinity and observed McCray. Upon seeing the police car, McCray "hurriedly" walked between two buildings. The police then arrested McCray without a warrant. A search of McCray's person incident to the arrest produced heroin. *Id.* at 302-03.

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[5]The New Jersey Supreme Court clearly ignored the significance of this last element of the totality of the circumstances test. In its initial discussion of the elements of the totality of the circumstances test, the court did not even mention the experience of the police as an element. Further, when discussing the facts of the case, the court totally discounted the experience of the police. The opinion dismissed the issue by stating that defendant had not engaged in any suspicious actions permitting the police to make a judgment. App. A at 14a. However, the opinion completely ignored the tesimony of Detective Hilongos that he knew the neighborhood, and that very building, to be rife with drug sales. Indeed, Hilongos had personally perviously executed search warrants for drugs in that building complex. *See Ornelas v. United States*, 517 U.S. 690, 700 (1996) ("[O]ur cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists").

Based on the above facts, this Court held,

> There can be no doubt, upon the basis of the circumstances...that there was probable cause to sustain the arrest and incidental search in this case....[T]he [trial] court was fully justified in holding that at the time the officers made the arrest 'the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense'.

Id. at 304 (emphasis added).

It is true that the informant in *McCray* had a more extensive track record for reliability than the informant herein. However, as discussed above, the present informant's previous provision of information leading to a conviction was sufficient to establish his/her reliability. *See Illinois v. Gates*, 462 U.S. at 232 n. 7; *Jones v. United States*, 362 U.S. 257 (1960). Moreover, the remaining facts of the two cases are remarkably similar. It is thus clear that the decision below is in conflict with that of this Court in *McCray*.

Other cases involving very similar facts where the courts each found probable cause to arrest and/or search, include:

State v. Butler, 655 So.2d 1123 (Fla. 1995). A reliable informant told the police that a black male, about 5'10" tall, wearing a black jacket, white t-shirt, and blue jeans, was selling powdered cocaine on the sidewalk in front of 726 West Beaver Street, a location known to be part of an area with a high volume of street level drug sales. The informant told the police that the described drug seller wrapped cocaine inside rolled-up one-dollar bills and placed them in his pants pocket, ready to sell. *Id.* at 1124-25. The police proceeded to the location indicated and observed Butler whose clothes

and appearance matched the description given by the informant. With no further investigatory action, the police searched defendant's person and found cocaine wrapped in a dollar bill. Defendant was then formally arrested. *Id.* at 1125. These facts led the Florida Supreme Court to find the existence of probable cause. *Id.* at 1130-31.

Turner v. United States, 588 A.2d 280 (D.C. 1991) . A reliable informant informed the police that "a black male, wearing a burgundy sweatshirt jacket, burgundy sweatpants, and a black Coca-Cola cap turned backwards, was holding and selling cocaine in front of 1424 Chapin Street, N.W." *Ibid.* Without more, Turner was located, arrested and searched. Based on the above facts, Turner's subsequent motion for suppression was denied. *Id.* at 281.

Jefferson v. United States, 476 A.2d 685 (D.C. 1984). A reliable informant called a police detective with a description of a woman who he advised had been selling narcotics inside a liquor store at Twelfth and U Street, N.W. About five minutes after receiving the phone call, three officers arrived at the liquor store and saw Jefferson who matched the description the informant had given of the drug seller, leaving the store. She was detained, searched, and two tablets of illegal drugs were discovered in her gloves. *Ibid.* Jefferson's motion for suppression was denied. *Id.* at 686.

United States v. Rucker, 138 F.3d 697 (7th Cir. 1998). An informant not of long standing, but who had previously provided accurate information, informed a police officer that "Greg" Rucker was standing near Weezy's Tavern and was in possession of cocaine in his shoe. He described "Greg" as wearing a black outfit and driving a green Cadillac. The officer knew Rucker had been arrested previously for sales of drugs and used his shoe to hide the drugs. The officer confirmed Rucker's location, that he was wearing black clothes and that his green Cadillac was in the area. Rucker was then arrested and searched, which search revealed crack

cocaine. *Id.* at 698-99. Based on this information alone, the court concluded that the warrantless arrest was justified. *Id.* at 700-01.

United States v. Lincoln, 992 F.2d 356 (D.C. Cir. 1993). Two different reliable informants reported to the police that they had observed individuals matching the codefendants' descriptions travelling in a red jeep with wood panelling and distributing drugs. In addition, one informant stated there were drugs and guns inside the jeep, identified the name of one of the two dealers as "Frank" and furnished a license plate number which the officers' investigation showed belonged to a jeep registered to Franklin Coleman and matched the one on the jeep under surveillance. Based on these facts the court concluded the officers had probable cause to arrest the codefendants. *Id.* at 358.

Several state intermediate appellate courts also have found probable cause based on facts almost identical to those present herein. *Thomas v. State*, 430 S.E.2d 849 (Ga. Ct. App. 1993); *Pattman v. State*, 431 S.E.2d 706 (Ga. Ct. App. 1993); *State v. Bell*, 482 So.2d 11 (La. Ct. App. 1985). *See also United States v. Ayers*, 924 F.2d 1468, 1478-79 (9th Cir. 1991); *United States v. Abadie*, 879 F.2d 1260, 1263-64 (5th Cir.), *cert. denied*, 493 U.S. 1005 (1989); *United States v. Marbury*, 732 F.2d 390, 398 (5th Cir. 1984); *State v. Robinson*, 342 So.2d 183, 188 (La. 1977) (reliable informant described suspect by name, clothing and location which facts properly lead to stop of defendant and subsequent arrest); *State v. Hasenbank*, 425 A.2d 1330, 1333 (Me. 1981) ("detailed descriptive characteristics of the person," including clothing and location are sufficient to verify an anonymous tip and establish reasonable suspicion for a *Terry* stop); *People v. Darden*, 34 N.Y.2d 177, 179-80, 313 N.E.2d 49, 51 (1974).

As can be seen from the above-cited cases, the facts of the present case are typical of those faced by police officers

each and every day. It is vital that these officers be given proper guidance by the courts as to how they should handle such tips. The state court decision below is contrary to the well established law of this Court and of many other courts in this country. The reasoning and result therein could therefore well be misleading to police agencies, and other courts, in the nation, and, of course, is binding on law enforcement and the courts in New Jersey. The interpretation of federal Constitutional law should be uniform throughout the nation, but such will not be the case if this decision is allowed to stand. Plainly, this unfortunate situation should be corrected by this Court after a grant of certiorari.

CONCLUSION

The United States Court of Appeals for the D.C. Circuit has correctly observed that,

> [T]he peculiar nature of narcotics crimes means that arrests are almost totally dependent on tips and undercover work; there are no reporting "victims." Therefore, enforcement officials actively encourage such tips from citizens who deplore the effects of drug traffic on their children and their neighborhood. If we are serious about enforcing drug trafficking laws, police must have the ability to reasonably follow-up such...tips through investigation.

United States v. White, 648 F.2d 29, 43-44 (D.C. Cir.) *(emphasis added), cert. denied*, 454 U.S. 924 (1981). *See McCray v. Illinois*, 386 U.S. 300, 307 (1967) ("...the informer is a vital part of society's defensive arsenal").

In *Illinois v. Gates*, 462 U.S. 213 (1983), this Court established the totality of the circumstances test to "hold the balance true," between the civil rights of our citizens and the needs of law enforcement to protect the security of our

citizens. *Id.* at 241. The state court ruling below, however, upsets that balance by making corroboration a rigid independent prong of the totality of the circumstances test which must be satisfied in every case and by requiring police observation of "suspicious" or incriminating details as a prerequisite to the finding of probable cause. The opinion also distorts the totality of the circumstances test by stating that the quantity and nature of the evidence which must be presented to establish the reliability of an informant is now greater than it was under the *Aguilar/Spinelli* standard. Unlike other courts faced with similar facts, the majority below does not adequately appreciate the true nature of the totality of the circumstances test and the critical role played by informants in crime detection, especially with regard to narcotics. By granting certiorari and reversing the state court's ruling, this Court can correct these errors, foster uniformity of interpretation of federal Constitutional law and again instruct lower courts as to the appropriate balance in this crucial area of the law. *See Illinois v. Gates*, 462 U.S. at 237 ("the most basic function of any government" is "to provide for the security of the individual and of his property").

Respectfully submitted,

PETER VERNIERO
Attorney General of New Jersey
Attorney for Petitioner

GERARD C. SIMS, JR.
Deputy Attorney General
Attorney of Record

Dated: October 8, 1998

APPENDIX

APPENDIX A

SUPREME COURT OF NEW JERSEY
A-32 September Term 1997

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SHAWN SMITH,

Defendant-Appellant.

Argued January 5, 1998 -- Decided July 16, 1998

On certification to the Superior Court, Appellate Division, whose opinion is reported at 291 N.J. Super. 245 (1996).

Mark H. Friedman, Assistant Deputy Public Defender, argued the cause for appellant (*Ivelisse Torres*, Public Defender, attorney).

Frank Muroski, Assistant Prosecutor, argued the cause for respondent (*Thomas V. Manahan*, Union County Prosecutor, attorney).

Leslie Stolbof Sinemus argued the cause for *amicus curiae* Association of Criminal Defense Lawyers-New Jersey.

Gerard C. Sims, Jr., Deputy Attorney General, argued the cause for *amicus curiae* Attorney General of New Jersey (*Peter Verniero*, Attorney General, attorney).

The opinion of the Court was delivered by

HANDLER, J.

This is a search and seizure case. In this case, and in *State v. Zutic*, ___ N.J. ___ (1998), also decided today, the central issue is whether incriminating evidence that was used to secure a defendant's conviction for drug offenses was obtained as the result of an unreasonable warrantless search of the defendant's person. The more specific issue is whether a confidential informant's tip, together with some corroboration of the information contained in the tip, established probable cause to justify the search of defendant's person. An additional issue relates to whether the ultimate seizure of the incriminating drugs was tainted by the initial personal search of defendant without probable cause.

I

On February 23, 1993, a confidential informant told Detective Robert Hilongos, an experienced member of the Narcotics Bureau of the Elizabeth Police Department, that a man was selling drugs in the lobby of the Oakwood Plaza Apartments, located at 400 Irvington Avenue in Elizabeth. The informant described the yellow cap. The informant said the man was taking orders from people in the lobby and then retrieving drugs from apartment #2L. The informant also

said that the man was using a red Datsun parked across the street with license plate number HIO 33D.

Hilongos knew the informant and believed him to be reliable. The informant had done "one job" for Hilongos in the past, and the informant's information resulted in an arrest and conviction. A few minutes after receiving the tip, Hilongos and two other police officers proceeded to Oakwood Plaza in an unmarked vehicle. Two uniformed officers were also called to the scene. Upon arrival, Hilongos saw a black man wearing a three-quarter length black coat and a yellow cap and standing on the sidewalk approximately fifty or sixty feet from the lobby entrance. There was a red Datsun parked across the street from the apartments, but Hilongos could not remember if he saw the car before or after stopping defendant.

Hilongos stopped and searched the man who was later identified as defendant, Shawn Smith. He seized a pair of keys from defendant. Hilongos testified that he was searching for drugs and that he knew the keys were not a weapon. None of the keys were imprinted with an apartment number or any other distinguishing marks. When asked what he was doing in the area, defendant told Hilongos that he lived in Newark but was visiting relatives in the area. Hilongos testified that he did not attempt to conduct surveillance or otherwise verify the informant's tip because it was impracticable.

After seizing the keys, Hilongos had the two uniformed officers detain defendant while he went upstairs and knocked on apartment #2L. He also called the apartment manager, Kathy Ryan, to the scene. While waiting for Ryan, Hilongos knocked on the door to #2L, but no one answered. A neighbor, Andrea Smith, informed Hilongos that someone named Stacy Walker lived in the apartment but Walker was in the hospital. According to Hilongos's testimony, Andrea Smith told him that Walker was her sister and defendant was

her brother. Andrea Smith testified, however, that defendant is not related to her.

Either Andrea Smith or another neighbor, Patricia Wright, called Walker at the hospital. The phone was passed from Smith to Ryan and then to Hilongos. Eventually, Walker gave Hilongos permission to enter the apartment. Ryan testified that she "told [Walker] that the cops wanted to get into her unit because apparently they had somebody that had keys or something to her unit." Hilongos testified that he could not remember if he told Walker that she had a right to refuse permission to enter the apartment. Walker testified that Ryan told her that police needed access to Walker's apartment and they wanted permission to enter the apartment. Ryan advised Walker that she had a right to refuse access to her apartment, but warned Walker that her refusal would cause the police to obtain a search warrant and "if the police had to get a warrant to get in, [Walker] would be responsible for damages because normally they break the door." Walker testified that the police told her that they needed to enter her apartment to retrieve defendant's wallet.

Ryan and Andrea Smith described Walker, who was pregnant and was hospitalized because of high blood pressure, as being "upset," "crying," and "hysterical" during their telephone conversations with her. Andrea Smith testified that "[Ryan] was trying to calm her down and I heard her telling Stacy something to the effect, no, you're not going to lose your apartment and you have nothing to worry about and you don't have to let them go into the house." Walker gave Hilongos permission to enter her apartment after Ryan assured her that she would not be evicted.

After Walker consented to the entry, Hilongos entered apartment #2L by using one of the keys he had seized from defendant. The police found inside the refrigerator a plastic bag containing fifty-nine vials of what looked like cocaine.

Hilongos then "notified the officers that were holding [defendant] to place him under arrest."

On July 1, 1993, a Union County Grand Jury indicted defendant, charging him with third degree possession of a controlled dangerous substance (CDS) (count one), third degree possession of a CDS with intent to distribute (count two), and third degree possession of a CDS with intent to distribute within 1000 feet of a school (count three).

The trial court denied defendant's motion to suppress the keys and the cocaine. The court held that whereas the seizure of the keys was unlawful, the discovery of the cocaine was lawfully based on Walker's consent. The court held that once the cocaine was discovered, the keys would have inevitably been discovered. Therefore, the court denied the suppression motion in respect of both the keys and the cocaine. After losing the suppression motion, defendant pled guilty.

Defendant appealed the denial of his motion to suppress, and the Appellate Division affirmed. 291 N.J. Super. 245 (1996). The Appellate Division ruled that the search of defendant was justified by probable cause to arrest him. *Id.* at 258. The court sustained the search of the apartment based on Walker's consent. *Ibid.* In the alternative, the court held that defendant had no expectation of privacy in the apartment to support a claim that the search violated his constitutional rights. *Id.* at 261. We granted certification on March 4, 1997. 149 N.J. 33.

II

Our analysis of Smith's suppression motion begins with a consideration of whether the on-the-street search which yielded the keys was constitutional. Probable cause is ordinarily needed in order to justify a search. *See State v. Novembrino*, 105 N.J. 95, 106 (1987) ("The probable-cause requirement is the constitutionally-prescribed standard for

distinguishing unreasonable searches from those that can be tolerated in a free society."). The State's constitutional standard parallels that of the United States Constitution. *Chambers v. Maroney*, 399 U.S. 42, 51, 90 S. Ct. 1975, 1981, 26 L. Ed. 2d 419, 428 (1970) ("In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution.").

In limited circumstances, police may conduct a protective search of a suspect without probable cause. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968). A protective search does not entail a general search of the person for evidence of crime; rather it is "designed to discover weapons that could be used to assault the officer." *State v. Arthur*, 149 N.J. 1, 14 (1997). A protective search may be based on reasonable articulable suspicion that a suspect is armed and dangerous. *Ibid.* Hilongos's search of defendant was for contraband and not for weapons; thus, the protective search exception to probable cause does not apply, and probable cause was required to justify the search of defendant.

The Appellate Division held that Hilongos had probable cause that served as a basis for Smith's arrest and, therefore, the ensuing personal search of Smith was undertaken as an incident to that arrest. 291 N.J. Super, at 258. However, the police must have contemporaneous subjective intent to arrest in order to justify a search incident to arrest. *State v. Sims*, 75 N.J. 337, 353 (1978). There is no evidence that Hilongos had a subjective intent to arrest Smith when he stopped and subjected him to a search. Nonetheless, because probable cause to arrest is the functional equivalent of probable cause to search, the test for determining probable cause must still be met. The basic issue, therefore, was whether there was probable cause to justify the personal search of defendant.

Hilongos's suspicions were primarily based on a tip from a confidential informant. Information related by informants may constitute a basis for probable cause. Such information, though hearsay, may provide a sufficient basis for probable cause, "so long as a substantial basis for crediting the hearsay is presented." *Novembrino*, supra, 105 N.J. at 111 (quoting *United States v. Jones*, 362 U.S. 257, 269, 80 S. Ct. 725, 735, 4 L.Ed.2d 697, 707 (1960)). The sufficiency of the information related by an informant as a basis for establishing probable cause is determined by a standard that calls for consideration and analysis of all relevant circumstances.

In *Illinois v. Gates*, 462 U.S.. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), the United States Supreme Court held that the reliability of an informant's tip must be analyzed under the totality of the circumstances. *Id.* at 238, 103 S. Ct. at 2332, 76 L. Ed. 2d at 548. We adopted that test under our Constitution in *Novembrino*, supra, 105 N.J. 122. *See State v. Lewis*, 116 N.J. 477, 486 (1989) (observing in a case involving a warrantless search "[w]e follow the totality of the circumstances test for probable cause.").

Two factors generally considered to be highly relevant, if not essential, that are included in the "totality of the circumstances" are the informant's "veracity" and the informant's "basis of knowledge." *Gates*, supra, 462 U.S. at 238, 103 S. Ct. at 2332, 76 L. Ed. 2d at 548. Those factors, which are considered in evaluating the totality of circumstance, were derived from earlier cases that invoked and applied them as necessary prongs in determining probable cause, *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969)). Unlike the two-prong test that had been formulated in *Aguilar* and *Spinelli*, under which both "veracity" and "basis of knowledge" were essential elements in demonstrating probable cause, neither of these factors, though relevant, is an essential element under the totality of the circumstances test.

Under *Gates*, a deficiency in one of the *Aguilar/Spinelli* factors "may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Gates*, *supra*, 462 U.S. at 233, 103 S. Ct. at 2329, 76 L. Ed. 2d at 545. *Gates* recognized, in the parallel context of probable cause sufficient to obtain a search warrant, "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* at 238, 103 S. Ct. at 2332, 76 L. Ed. 2d at 548.

Because each of the *Aguilar/Spinelli* factors constitutes a relevant circumstance, both must be considered in assessing all of the surrounding circumstances. The first factor focuses on the informant's "veracity." In looking to whether an informant demonstrates "veracity," this Court has previously stated that past instances of reliability may establish the informant's veracity. *State v. Ebron*, 61 N.J. 207, 212-13 (1972) (holding under *Aguilar/Spinelli* that satisfactory prior experience with an informant was sufficient to meet the requirement of veracity). Under the totality of the circumstances test, past reliability remains probative of veracity, although its weight in the ultimate determination of probable cause may vary with the circumstances of each case. For example, in *Novembrino*, supra, we recognized that an informant's veracity could be supported by information that the informant has "proven reliable in several investigations (with information he provided)." 105 N.J. at 123. Nonetheless, a few past instances of reliability do not conclusively establish an informant's reliability.

The second factor under *Gates*, is whether the informant had a "basis of knowledge" for the information given to the police. The basis of knowledge is relevant to a determination

that the information was obtained in a reliable way. *Novembrino*, *supra*, 105 N.J. at 113. The "basis of knowledge" can be disclosed by the informant if the tip itself relates expressly or clearly how the informant knows of the criminal activity. *Ibid.* Even in the absence of a disclosure that expressly indicates the source of the informant's knowledge, the nature and details revealed in the tip may imply that the informant's knowledge of the alleged criminal activity is derived from a trustworthy source. *Ibid.* Such detailed or special information is particularly important if the tip does not otherwise disclose that the informant's knowledge is based on trustworthy sources. Thus, in *Novembrino*, we stated: "In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." *Ibid.* (citing *Spinelli*, supra, 393 U.S. at 416, 89 S. Ct. at 589, 21 L. Ed. 2d at 644); *see State v. Perry*, 59 N.J. 383, 392-93 (1971) (holding that an informant's tip detailing that 'Monies, jewelry, doctor's bag and narcotics' were in the a particular location contained the type of detail that was probably known from personal knowledge). By providing sufficient detail in the tip or recounting information that could not otherwise be attributed to circulating rumors or be easily gleaned by a casual observer, an informant can implicitly disclose a reliable basis of knowledge as the foundation of the information related to the police.

The basis of knowledge for the tip can also be established by predicting hard-to-know *future* events. The prediction of future events can imply that the informant derived that information directly as a witness or as one privy to a reliable witness or source. The prototypical case in which prediction of future events provided the basis of knowledge for the tip is *United States v. Draper*, 358 U.S. 307, 79 S. Ct. 329, 3 L.

Ed. 2d 327 (1959). In *Draper*, the informant indicated that the defendant would be arriving by train from Chicago at a particular time of day and provided a description of the defendant's physical appearance, the clothing he would be wearing, the bag he would be carrying, and the brisk pace of his gait. *Id.* at 309, 79 S. Ct. at 331, 3 L. Ed. 2d at 329-30. It is unlikely that an informant could provide such detail about future events unless the informant had a sufficient basis of knowledge of the underlying criminal conduct. Therefore, the mere allegation that such future events will occur is sufficient to infer that the informant is at least claiming to be relying on a reliable source.

Because the information contained in an informant's tip is hearsay and must be invested with trustworthiness to be considered as probative evidence, corroboration is an essential part of the determination of probable cause. Independent corroboration is necessary to ratify the informant's veracity and validate the truthfulness of the tip. "[T]he informant's veracity, if inadequately documented in the officer's affidavit, could be bolstered by a corroborative investigation." *Novembrino*, supra, 105 N.J. at 113. As Justice White observed in *Gates*, if police corroborate "information from which it can be inferred that the informant's tip was grounded on inside information, this corroboration is sufficient to satisfy the basis of knowledge prong" as well as the veracity prong. *Gates*, supra, 462 U.S. at 270 n.22, 103 S. Ct. at 2349-50 n.22, 76 *L*.Ed.2d at 569 n.22 (White, J., concurring); *Novembrino*, *supra*, 105 N.J. at 114 n.6.

Two cases that demonstrate the importance of corroboration are *Draper*, supra, and *State v. Hutchins*, 116 N.J. 457 (1989). In *Draper*, police corroboration of hard-to-know predictive detail generated a strong inference that the informant was not fabricating the story and that the allegation that the defendant would be carrying drugs was also based on reliable information. 358 U.S. at 313, 79 S. Ct. at 333, 3 L.

Ed. 2d at 332. In *Hutchins*, *supra*, the police received a tip that "a black man named Bob, dressed in blue, was selling heroin from a certain address in Newark." *Id.* at 459. We remanded the case for the trial court to resolve certain factual issues including whether the police corroboration sufficiently bolstered the unverified tip. *Id.* at 460, 474. Thus, under a totality of the circumstances test, corroboration of information provided in a tip can be a strong indicia of the reliability of the informant's tip.

In applying this analysis to the facts of this case, we may conclude that there was some evidence of the informant's veracity. Hilongos stated he believed the informant to be reliable because "[h]e did a job for me in the past." Under *Aguilar/Spinelli*, a single instance of past reliability would have been sufficient evidence of the veracity factor. *See Ebron*, *supra*, 61 N.J. at 212-13. However, under the totality of the circumstances test, we must determine how much weight to give the informant's veracity in reaching the ultimate determination of probable cause. As to its weight, the recitation in the tip reveals little about Hilongos's informant other than that the informant had been reliable once previously in a case that led to a conviction. *Cf. Zutic*, *supra*, ___ N.J.___ at (slip op. at 9) (indicating that conclusory statement that informant was reliable insufficient to establish veracity). While that information increases the likelihood that the informant was being truthful and possessed the necessary "veracity," without more information relating to the informant's history or motives, the information does not firmly establish his truthfulness in this case.

The "basis of knowledge" factor must also be assessed under the totality of circumstances in accordance with its weight. Although the informant did state that the transactions were going on "at that time," the informant did not expressly allege or otherwise indicate the source or basis of his or her knowledge in relating the tip. As noted, the contents of a tip, particularly the kind of factual details provided, can

inferentially establish the informant's claim of a reliable basis of knowledge. The tip here alleged that defendant was meeting people in the lobby, going into apartment #2L, and returning to the lobby to give the people drugs. It also mentioned that a particular car used by defendant was located on the street in the area. The Appellate Division found that "in all likelihood only one conversant with the criminal activity would know" those details. 257 N.J. Super. at 257. Although the informant provided a detailed description of the suspect's movements about the building, the informant did not provide any detail about the drug transactions themselves. If the informant had been privy to the criminal activity, he or she would have been likely to know such detail as the manner the drugs were packaged or where the drugs were kept in the apartment. This informant provided no such information. The detail about the suspect's movements was not information the informant could claim to know only if he or she had a reliable source of information. The lack of detail and other special or unusual facts militates against the inference that the informant had a sufficient basis of knowledge that defendant was engaging in unlawful drug transactions. Rather, the descriptive information is such that it can be readily inferred that the informant was not an insider or a person especially close to defendant or directly aware of the criminal activities ascribed to defendant. No detail included in the tip provides information from which it may be inferred that the informant had personal knowledge or was privy to a reliable person with such knowledge that defendant was entering the apartment to obtain drugs and returning with drugs, nor does any detail of the tip indicate or reveal how the informant knew that defendant's conduct involved a drug transaction. Without knowing the facts that led the informant to believe defendant was engaged in illegal activity, we cannot make an independent determination of whether that conclusion was reasonable. *See Novembrino*, *supra*, 105 N.J. at 125 (holding that an informant's bald conclusion "unsupported by an reference to dates, events, or circumstances" did not give a

neutral judge a basis for making an independent evaluation).

The evidentiary weakness of the basis-of-knowledge factor under the totality of the circumstances test goes only to the weight and does not as such necessarily establish the absence of probable cause. Even where the tip lacks sufficient detail to establish a basis of knowledge, independent police investigation and corroboration of the detail in the tip must be considered because it may in some circumstances add to the evidentiary weight of factors as well as the overall circumstances. In reaching the conclusion that the police had probable cause, the Appellate Division observed that the police corroborated the informant's description of the suspect, the modus operandi, and the use of the red Datsun. 291 N.J. Super. at 257-58. The police corroborated defendant's description and approximate location, but the evidence does not support the finding that they corroborated the modus operandi or the use of the Datsun. When making its factual findings, the trial court acknowledged, "The State concedes that other than seeing a man dressed as indicated in the tip, the police did nothing to corroborate any other information because it was 'not feasible.'" That finding is supported by the record. To the extent that the tip described a modus operandi, it alleged that the suspect would be meeting with people and going-back and forth between the lobby and apartment #2L. Rather than corroborate that information, the police only briefly observed defendant standing alone outside the building. Also, Hilongos testified that he could not remember if he saw the Datsun before or after he searches defendant. Moreover, the police corroboration did not include the observation of any suspicious drug transaction or criminal activity. The police corroboration only of the suspect's description and location did not bolster the tip's reliability or add to its weight. The informant could have easily known defendant's description and location without being privy to criminal activity, and police corroboration of that neutral information does not alone or with all the surrounding circumstances suggest that defendant was

engaged in criminal activity. *See Zutic, supra*, _ N.J. _ at (slip op. at 11).

Finally, we note that Hilongos's extensive experience with drug transactions did not contribute to the existence of probable cause in this case. Certain suspicious behavior may lead an experienced police officer to suspect that a person is engaged in criminal activity. *See, e.g. Arthur, supra*, 149 N.J. at 9. An officer's experience may enable the officer to draw inferences that an untrained, inexperienced person could not. In *Arthur*, we observed that courts should "ascribe sufficient weight to the officer's knowledge and experience and to the rational inferences that could be drawn from the facts objectively and reasonably viewed in light of the officer's expertise." *Id.* at 10. However, the mere fact that an officer is experienced does not lower the quantum of evidence needed to establish probable cause. An officer's experience is only useful in establishing probable cause if the officer uses the experience to infer that a suspect is engaged in criminal activity. In this case, there was no suggestion that Hilongos used his experience to infer that defendant was selling drugs. The only observation Hilongos made was of defendant standing on the sidewalk wearing a coat and a yellow cap. His experience did not lead him to believe that such a person was engaged in criminal activity. Thus, his experience does not contribute to a finding of probable cause.

In sum, we conclude that in the totality of the circumstances, Hilongos did not have probable cause when he searched defendant. Although the informant's veracity is bolstered by one prior occasion of reliability, doubts concerning potential ulterior motives must remain. Also, the easy-to-know detail in the tip did not imply a reliable basis of knowledge. Finally, the police corroboration of that easy-to-predict detail did not bolster the informant's reliability in respect of the allegation of criminal activity. Taken as a whole, these circumstances did not amount to probable cause.

Therefore, the personal search of defendant and seizure of the keys from defendant were unlawful.

III

Because the personal search of defendant was not based on probable cause and was unreasonable, the next issue presented is whether the discovery of the drugs in apartment #2L was based on the seizure of the keys to the apartment that were obtained as a result of the unlawful search of the defendant and, if so, whether that renders the subsequent search and seizure of evidence from the apartment unlawful.

Evidence obtained as the fruit of an unlawful search or seizure must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); *State v. Barry*, 86 N.J. 80, 87, *cert. denied*, 454 *U.S.* 1017, 102 S. Ct. 553, 70 L. Ed. 2d 415 (1981); *accord State v. Sugar*, 84 N.J. 1, 25 (1980) (excluding all evidence derived from violation of the attorney client privilege, because "the fruits of [law enforcement's] lawlessness must not be allowed to aid a prosecution in any manner."). Three factors determine whether subsequently obtained evidence is tainted by a prior illegality: (1) the presence of intervening circumstances between the original illegality and the challenged evidence; (2) the temporal proximity between the original illegality and the challenged evidence; and (3) the flagrancy and purpose of the police misconduct. *Brown v. Illinois*, 422 U.S. 590, 603-04, 95 S. Ct. 2254, 2261-62, 45 L. Ed. 2d 416, 427 (1975).

Both lower courts ruled that the seizure of drugs from the apartment was reasonable because access to the apartment was based on Walker's consent. Implicit in that conclusion is that the antecedent search of defendant, which resulted in the seizure of the keys to the apartment, did not lead to or significantly influence Walker's consent.

Although Walker's decision to give consent cannot be ascribed to a single reason or motive, it is clear that it was heavily influenced by the unlawful seizure of the keys from defendant. Walker knew that the police had obtained keys to her apartment from defendant, and that knowledge was a major factor in her decision to give consent to the police to enter the apartment to investigate. Thus, Walker's consent was not an independent intervening circumstances. A consent to search that is attributable to police misconduct involving the violations of constitutional rights may be regarded as the product of that unconstitutional conduct and an invalid basis on which to justify a search. *State v. Johnson*, 120 N.J. 263, 288 (1990) (holding that consent that grew out of an illegally obtained confession was "fruit of the poisonous tree" and thus invalid); *cf. State v. Judge*, 275 N.J. Super. 194, 206 (App. Div. 1994) (finding consent to search was not tainted because the police had probable cause to search without consent). With regard to temporal proximity, there was no significant delay between the seizure of the apartment keys from defendant and the elicitation of Walker's consent. Shortly after defendant was seized and searched, Walker was told that the police were currently standing outside her apartment door with a set of her keys. In light of those factors, the discovery of the drugs was a product of the unlawful seizure of the keys. Therefore, the drugs must also be suppressed.

The Appellate Division also ruled that defendant had no expectation of privacy in the apartment and consequently had no standing to challenge the reasonableness of the search of the apartment and the seizure of the drug contraband. The circumstances of this case do not require consideration of the issue of standing. *See Arthur*, *supra*, 149 N.J. at 13 (noting but not deciding issue of standing to challenge unreasonable search of another person). Where evidence is obtained as the fruit of the poisonous tree of a prior unlawful search, the defendant's right to object to its admission as evidence is rooted in the initial violation of his or her rights. In the context of this case, we need not consider whether defendant

had an expectation of privacy in apartment #2L. Defendant did have an expectation of privacy in his own person, and the discovery of the drugs in the apartment was directly related to and the clear result of the violation of that personal right. The search of defendant ultimately led to the drugs, and suppression of the drugs is necessary to protect his expectation of privacy in his own person. *See Wong Sun*, *supra*, 371 U.S. at 488, 83 S.Ct. at 417, 9 L.Ed. 2d at 455 (suppressing drugs found in another's apartment because they were the fruit of a statement unlawfully obtained from the defendant); *See Johnson*, *supra*, 120 N.J. at 288.

IV

The judgment of the Appellate Division is reversed.

JUSTICES POLLOCK, O'HERN, and STEIN join in JUSTICE HANDLER's opinion. CHIEF JUSTICE PORITZ and JUSTICES GARIBALDI and COLEMAN have filed a separate dissenting opinion.

SUPREME COURT OF NEW JERSEY
A-32 September Term 1997

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SHAWN SMITH.

Defendant-Appellant.

PORITZ, C.J., GARIBALDI, J., and COLEMAN, J., dissenting.

We would affirm the judgment below substantially for the reasons expressed in the opinion of the Appellate Division, which is reported at 291 N.J. Super. 96 (1996).

APPENDIX B

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4373-94T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SHAWN SMITH,

Defendant-Appellant.

Argued April 30, 1996 - Decided

Before Judges Baime, Villanueva and Bilder.

On appeal from Superior Court of New Jersey, Law Division, Union County.

Mark H. Friedman, Assistant Deputy Public Defender, argued the cause for appellant (Susan L. Reisner, Public Defender, attorney; Mr. Friedman, of counsel and on the brief).

Frank Muroski, Prosecutor's Agent, argued the cause for respondent (Edward M. Neafsey, Assistant Attorney General, Acting Union County Prosecutor, attorney; Mr. Muroski, of counsel and on the brief).

The opinion of the court was delivered by
BAIME, J.A.D.

Following the denial of his motion to suppress evidence, defendant pled guilty to possession of cocaine within a school zone with intent to distribute (*N.J.S.A.* 2C:35-7) and was sentenced to four years imprisonment. He appeals on the ground that the police violated his federal and state constitutional rights by engaging in an unlawful search and seizure. We disagree and affirm defendant's conviction.

I.

On February 23, 1993, Detective Robert Hilongos, a highly experienced member of the Elizabeth Police Department, received a telephone call from an informant who had proven reliable in the past by providing information that had led to an arrest and conviction. The informant told the detective that a black male wearing a three-quarter length black jacket and a yellow cap was selling drugs from the lobby of a building located at 400 Irvington Avenue in Elizabeth. According to the informant, the individual was accepting orders in the lobby and retrieving the drugs from apartment 2L. The informant added that the drug seller was using a red Datsun with license number H10 33D. The gist of the conversation was that the drug transactions were taking place while the informant was talking and that the informant was actually witnessing the illegal sales.

Detective Hilongos was familiar with the housing project described by the informant, having executed several search warrants in the area. The officer described the project as a "high narcotic trafficking area." Upon their arrival, the detective and four other officers observed defendant, dressed in a three-quarter length black jacket and wearing a yellow cap, "standing . . . on the sidewalk in front of the . . . building." They also observed the automobile described by the informant parked across the street from the building.

Because the lobby was partially hidden from view and there was no safe location from which to conduct a surveillance, the police were unable to monitor defendant's movements. Instead, the officers immediately approached defendant and searched him, discovering a set of keys.

While defendant was detained, Detective Hilongos proceeded to apartment 2L. The site manager, Kathy Ryan, was notified and soon arrived at the apartment. After knocking on the door and receiving no response, the detective was approached by Andrea Smith, who lived in a nearby apartment. Smith told the officer the apartment belonged to Stacy Walker, whom she identified as her sister. According to Smith, Walker was in the hospital. This was confirmed by Patricia Wright, another neighbor, who immediately telephoned Walker. Walker, who was pregnant at the time, had been hospitalized for approximately one week due to hypertension.

The details of the telephone conversation involving Walker, Ryan and Hilongos were hotly contested at the motion hearing. Detective Hilongos could not recall whether he advised Walker of her right to refuse to consent to a search, but nevertheless claimed that Walker ultimately granted permission.

Walker testified that she became quite upset during the telephone call because she had never given defendant permission to enter her apartment and was concerned that she would be evicted because of his criminal conduct. She emphasized, however, that no one threatened to evict her, and that, in fact, Ryan disavowed any intent to take such a course. Walker related that Ryan told her the police wished to search her apartment, but that she had the right to refuse. Despite these assurances, Walker testified that she feared she would be evicted if she refused to consent. Although Detective Hilongos allegedly told Walker that the police wished to enter her apartment in order to obtain defendant's wallet, this

falsehood apparently played no part in Walker's decision to grant the police permission to search. In any event, Walker conceded that she unequivocally gave the police her consent at some point during the conversation.

Both Smith and Ryan corroborated Walker's account. Ryan added that she told Walker the police would "probably" obtain a warrant if she refused to consent to the search and that she would be responsible for any damages if the officers found it necessary to break down the door to her apartment. Smith emphasized that defendant had forcibly taken from her the keys to Walker's apartment earlier in the day.

Upon obtaining Walker's consent, the police used the keys seized from defendant to gain entry to the apartment. Once inside, they conducted a search and discovered fifty-nine vials of cocaine in the door shelf of the refrigerator. Detective Hilongos then notified the officers detaining defendant, and defendant was formally placed under arrest.

The Law Division judge found that the seizure of the keys from defendant was unlawful because the police lacked probable cause to make an arrest and the search was too intrusive to be categorized as a legitimate frisk for weapons. The judge further concluded, however, that the detention of defendant was proper because it was based on reasonable suspicion, that the search of Walker's apartment and the seizure of the drugs found in the residence were lawful because she had voluntarily consented, and that the keys would have been inevitably discovered during a subsequent lawful search incident to defendant's arrest notwithstanding the initial police illegality. The judge denied defendant's motion to suppress the drugs and the keys on that basis.

II.

We first consider whether the police acted unlawfully when they searched defendant and seized the keys to Walker's

apartment. We agree with the Law Division judge's conclusion that the officers' search of defendant exceeded the scope of a permissible frisk for weapons under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and its progeny. The informant had given no indication that the suspect was armed, and the police observed nothing prior to searching defendant that would warrant such a conclusion. *See Adams v. Williams*, 407 U.S. 143, 147-49, 92 S.Ct. 1921, 1924, 32 L.Ed.2d 612, 618 (1972); *State v. Thomas*, 110 N.J. 673, 684 (1988). Detective Hilongos candidly admitted that the object of the officers' search was narcotics. Such conduct is not sanctioned by *Terry*. *See Ybarra v. Illinois*, 444 U.S. 85, 93-94, 100 S.Ct. 338, 343, 62 L.Ed.2d 238, 247 (1979). As recently reaffirmed by the United States Supreme Court in *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct.2130, 124 L.Ed.2d 334 (1993), the scope of a permissible frisk is "strictly 'limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.'" *Id.* at 373, 113 S.Ct. at 2136, 124 L.Ed.2d at 344 (quoting *Terry v. Ohio*, 392 U.S. at 26, 89 S.Ct. at 1882, 20 L.Ed.2d at 908).

We regard the exploratory activity of the police as a search incident to an arrest. Of course, a warrantless search conducted in order to produce grounds for an arrest is invalid, and, "conversely, an arrest without at least contemporaneous probable cause does not become justified by what the subsequent search discloses." *State v. Contursi*, 44 N.J. 422, 433 (1965); *State v. Hutchins*, 43 N.J. 85, 101 (1964); *State v. Doyle*, 42 N.J. 334, 342 (1964). We thus focus upon whether there was probable cause to arrest defendant prior to the search of his person.

Probable cause is an elusive concept heavily dependent upon the particular factual complex. It is more than mere suspicion but less than legal evidence necessary to convict. *State v. Mark*, 46 N.J. 262, 271 (1966). It has been described by our Supreme Court as a "well grounded" suspicion that an

offense has been committed. *State v. Burnett*, 42 N.J. 377, 387 (1964); *see also State v. Waltz*, 61 N.J. 83, 87 (1972); *State v. Kasabucki*, 52 N.J. 110, 116 (1968); *State v. Laws*, 50 N.J. 159, 173 (1967), *cert. denied*, 393 U.S. 971, 89 S.Ct. 408, 21 L.Ed.2d 384 (1968); *State v. Davis*, 50 N.J. 16, 24-25, (1967), *cert. denied*, 389 U.S. 1054, 88 S.Ct. 805, 19 L.Ed.2d 852 (1968); *State v. Dilley*, 49 N.J. 460, 463-64 (1967). Our courts have eschewed technisms in reviewing factual circumstances to determine whether probable cause exists. *State v. Esteves*, 93 N.J. 498, 505 (1983). Probable cause must be drawn from the "practical considerations of everyday life" as tested by reasonably prudent persons. *Brinegar v. United States*, 338 U.S. 160, 175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879, 1890 (1949). In dealing with probable cause, "as the very name implies, we are concerned with probabilities." *Ibid.* We must not forget that resolution of questions regarding whether or not probable cause exists often "involves no more than a value judgment upon a factual complex rather than an evident application of a precise rule of law, and indeed a value judgment which inevitably reflects the seasoning and experience of the one who judges." *State v. Funicello*, 60 N.J. 60, 72-73 (Weintraub, C.J., concurring), *cert. denied sub. nom. New Jersey v. Presha*, 408 U.S. 942, 92 S.Ct. 2849, 33 L.Ed.2d 766 (1972). It bears repeating that "the common and specialized experience and work-a-day knowledge of police [officers] must be taken into account." *State v. Contursi*, 44 N.J. at 431. Abstract contemplation will not suffice because the decisions of police officers often must be made on the spur of the moment and cannot be viewed fairly from the vantage point of twenty-twenty hindsight. The answer must be found "in the tumult of the streets." *State v. Gerardo*, 53 N.J. 261, 264 (1969).

Here, "we are dealing with law Enforcement efforts to eradicate one of the chief instrumentalities of human catastrophe, the distribution of dangerous drugs." *State v. Alvarez*, 238 N.J. Super. 560, 565 (App. Div. 1990). We

have described the business of drug trafficking as one "carried on warily and guardedly and in as many different ways and by as many conceivable methods as human ingenuity can devise in order to escape detection." *Id.* at 565-66. "That drug abuse constitutes an ancient foe of society does not, of course, detract from the need" to assure protection of Fourth Amendment values. *Id.* at 566. We point to the magnitude of the problem merely to emphasize that "'[l]aw enforcement officers have an even higher and more detailed degree of knowledge than judges of the devious ways' of the drug distributor." *Ibid.* (quoting *State v. Contursi*, 44 N.J. at 431-32).

We know from the recurrent nature of the issue that the police often rely upon information received from confidential informants in their efforts to enforce our drug laws. *See, e.g., State v. Novembrino*, 105 N.J. 95 (1987); *State v. Ebron*, 61 N.J. 207 (1972); *State v. Perry*, 59 N.J. 383 (1971). Our Supreme Court has permitted the police to rely on hearsay for the purpose of establishing probable cause, but has insisted that a "substantial basis" for crediting the information received must be established. *State v. Novembrino*, 105 N.J. at 120-21. In *Novembrino*, the Court described in great detail the evolution of constitutional principles dealing with this question. *Id.* at 110-19; *see also Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). We need not tread on ground so exhaustively covered in that opinion. Suffice it to say, when the assessment of probable cause depends upon information received by the police from a confidential informant, the test is "whether, given all the circumstances . . . , including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that" a crime has been or is being committed. *Illinois v. Gates*, 462 U.S. at 238, 103 *S.C.* at 2332, 76 L.Ed.2d at 548; *see also State v. Novembrino*, 105 N.J. at 117-18, 122-23. This "totality of

the circumstances" standard was originally formulated to govern the determination of probable cause respecting the issuance of search warrants. It has also been applied in the assessment of probable cause to conduct warrantless searches. *See, e.g., State v. Foreshaw*, 245 N.J. Super. 166, 176-79 (App. Div.), *certif denied*, 126 N.J. 327 (1991); *State v. Probasco*, 220 N.J. Super. 355, 358 (App. Div. 1987). Since the standard of probable cause to search is essentially no different from that of probable cause to arrest, there is no reason to conclude that the "totality of the circumstances" test does not govern our inquiry in this case. *See* 2 Wayne R. La Fave, *Search and Seizure: A Treatise on the Fourth Amendment*, §3.1(b) at 6-8 (3d ed. 1996) (quoting Comment, 28 *U. Chi. L. Rev.* 664., 687 (1961)).

While these principles can be stated with disarming ease, their application to concrete factual contexts is not without difficulty. However, we are not without guidance. In *State v. Perry*, 59 N.J. 383, the affidavit upon which the search warrant was issued was based on information "from a reliable informant, who ha[d] in the past given reliable information leading to arrests . . . ." *Id.* at 387. Our Supreme Court held that the informant's veracity was adequately established by the officer's reference to his past reliability. Id. at 390. In *State v. Ebron*, 61 N.J. 207, the affidavit recited information received from an "informer who had proven reliable in the past." *Id.* at 211. The Court concluded that the officer's assertion as to the informant's past reliability satisfied the test for determining the informant's veracity. *Id.* at 212-13. More recently, the Court cited *Perry* and *Ebron* with approval in determining that an informant's veracity was sufficiently supported by the officer's "unvarnished statement" that he "ha[d] proven reliable in several investigations . . . . " *State v. Novembrino*, 105 N.J. at 123.

Against this backdrop, Detective Hilongos' testimony that the informant here had supplied information resulting in an arrest and conviction plainly established the informant's

general veracity. The simple and overriding fact is that the Court has accepted less detailed endorsements of an informant as sufficient to satisfy the veracity requirement.

We are also convinced that the informant's "basis of knowledge" was adequately established. As we noted in our recital of the facts, it reasonably inferable that the informant was observing the drug sales at the very time he was relying the critical information to Detective Hilongos. Specifically, the officer was asked whether the informant indicated that defendant "was selling [drugs] at the time [the informant] spoke to [him]." Detective Hilongos responded that "[the informant] was saying at that time [defendant] was selling narcotics." Moreover, the information provided by the informant was extensively detailed. The informant set forth details which in all likelihood only one conversant with the criminal activity would know. Detective Hilongos had reason to believe that the information received from the informant was far more reliable than a mere rumor uttered by one of the criminal milieu. *See Draper v. United States*, 358 U.S. 307, 312-13, 79 S.Ct. 329, 333, 3 L.Ed.2d 327, 332 (1959).

We add that the information received from the informant was bolstered by the observations of the police when they arrived at the scene of the crime. *See State v. Ebron*, 61 N.J. at 212-13; *see also State v. Probasco*, 220 N.J. Super. at 358 (citing *State v. Sainz*, 210 N.J. Super. 17, 20-22 (App. Div. 1986), *aff'd*, 107 N.J. 283 (1987)). The informant's description of defendant's clothing, his *modus operandi*, and the proximity of the Datsun bearing a license plate number identical to the one described corroborated the informant's account. *See Draper v. United States*, 358 U.S. at 313, 79 S.Ct. at 333, 3 L.Ed.2d at 332; *State* v. Foreshaw, 245 N.J. Super. at 177; *State v. Alvarez*, 238 N.J. Super. at 566. Consideration of these factors separately may show no one in itself sufficient, but in combination with the officer's knowledge and experience relating to the "high narcotics

trafficking area" in which the crime was committed, the test was met.

We are thus satisfied that the police had probable cause to arrest defendant and that the search was reasonably incident to the arrest. Defendant's motion to suppress the keys was properly denied.

III.

We next address defendant's contention that the search of Walker's apartment contravened the Fourth Amendment as well as New Jersey's counterpart prohibition against unreasonable searches and seizures. We reject this argument for several reasons.

A.

Initially, we find ample support in the record for the Law Division judge's finding that Walker voluntarily consented to the search of her apartment. *State v. Johnson*, 42 N.J. 146, 162 (1964). Consent is a well-recognized exception to the rule authorizing the search of a home only when the police obtain a warrant issued upon probable cause by a neutral and detached magistrate. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S.Ct. 2041, 2045, 36 L.Ed.2d 854, 860 (1973); *Vale v. Louisiana*, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970). Thus, "where a valid consent is given a search may be conducted without a warrant and without probable cause." *State v. Douglas*, 204 N.J. super. 265, 276 (App. Div.), *certif. denied*, 102 N.J. 378 (1985) and *certif. denied*, 102 N.J. 393 (1986). In order to be valid, such consent must be "voluntarily given, and not the result of duress or coercion, express or implied . . . ." *State v. Johnson*, 68 N.J. 349, 352 (1975) (citing *Schneckloth v. Bustamonte*, 412 U.S. at 248-49, 93 S.Ct. at 2059, 36 L.Ed.2d at 875). In addition, as a matter of state constitutional law, when the prosecution attempts "to justify a search on the basis of

consent it has the burden of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent." *Id.* at 353-54. Finally, the person from whom consent is obtained must have authority to consent to a search of the premises. *State v. Douglas*, 204 N.J. Super. at 276.

Within this analytical framework, there is no question that Walker had the authority to consent to the search of her apartment and that she understood she had the right to refuse to grant her permission. Although we are troubled by Walker's testimony that Ryan told her the police would "probably" obtain a warrant if she refused and that she would be responsible if they found it necessary to break down her door, there is no evidence that Detective Hilongos participated in that part of the conversation or encouraged it. We recognize that consent in the face of a police officer's claim that he possesses a valid warrant is "instinct with coercion," and, thus, not voluntary. *See Bumper v. North Carolina*, 391 U.S. 543, 548-50, 88 S.Ct. 1788, 1791-92, 20 L.Ed.2d 797, 802-03 (1968). Consent is not valid if it is "no more than acquiescence to a claim of lawful authority." *Id.* at 549, 88 S.Ct. at 1791, 20 L.Ed.2d at 802; *see also Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329, 99 S.Ct. 2319, 2326, 60 L.Ed.2d 920, 930 (1979); *State v. Dolly*, 255 N.J. Super. 278, 285-86 (App. Div. 1991). We have extended this principle to invalidate searches based upon consent occasioned by threats of police officers to obtain warrants when they lacked probable cause to do so. *Compare State v. Cancel*, 256 N.J. Super. 430, 433-34 (App. Div. 1992), *certif. denied*, 134 N.J. 484 (1993) *with State v. Hladun*, 234 N.J. Super. 518, 522-23 (Law Div. 1989). But here, the police had probable cause to obtain a warrant, no threat was uttered, and there is no indication that Walker granted permission to search because she believed her refusal would be futile.

We are also troubled by Walker's testimony concerning her fear of eviction. Had the police threatened to evict Walker if she refused consent, we would hold unequivocally that her permission to search was coerced. But the police uttered no such threat, and the site manager clearly disavowed any intent to evict Walker if she refused to consent.

Finally, we are disturbed by the allegation that Detective Hilongos lied to Walker when he told her the police wished to enter her apartment only to obtain defendant's wallet. The Law Division judge found that no such statement was made, and we perceive no solid basis to disturb that finding. We merely add for the sake of completeness that intentional police deception regarding the purpose of a requested search "may be considered along with other factors as part of the totality of circumstances" compelling the conclusion that a consent was involuntary. *United States v. Carter*, 884 F.2d 368, 375 (8th Cir. 1989); *see also United States v. Andrews*, 746 F.2d 247, 250 (5th Cir. 1984), *cert. denied*, 471 U.S. 1021, 105 *S.Ct.* 2032, 85 L.Ed.2d 314 (1985), *overruled on other grounds*, *United States v. Hurtado*, 905 F.2d 74 (5th Cir. 1990) (en banc); *United States v. Brilev*, 726 F.2d 1301, 1304 (8th Cir. 1984); *Alexander v. United States*, 390 F.2d 101, 110 (5th Cir. 1968). *But see United States v. White*, 706 F.2d 806, 808 (7th Cir. 1983).

What has been said thus far should not be construed as an endorsement of the procedures used by Detective Hilongos to obtain Walker's consent. Clearly, it would have been preferable had the officer apprised Walker of her right to refuse her consent and barred the site manager and Walker's neighbors from speaking. But our organic law requires the police to abide by constitutional principles; it does not necessarily compel good police work. In any event, we conclude that Walker's consent was validly obtained.

B.

We uphold the search of Walker's apartment for another reason. Although we acknowledge that, due to his alleged possessory interest in the drugs seized, defendant had standing challenge the constitutional validity of the search of Walker's apartment, *State v. Alston*, 88 N.J. 211, 227-28 (1981); *see also State v. Mollica*, 114 N.J. 329, 339 (1989), we find that defendant lacked a sufficient privacy interest in the apartment to support the conclusion that the search violated his constitutional rights. Like its federal counterpart, the state constitution protects only objectively reasonable expectations of privacy. *State v. Hempele*, 120 N.J. 182, 198-200 (1990). Such an expectation must be derived from "'general social norms.'" *Id.* at 200 (quoting *Robbins v. California*, 453 U.S. 420, 428, 101 S.Ct. 2841, 2847, 69 L.Ed.2d 744, 751 (1981) (plurality opinion), *overruled on other grounds*, *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982)). The Law Division judge correctly found that defendant had no right to enter the apartment and had forcibly obtained the key. To hold that defendant may assert a constitutionally protected privacy interest in the very apartment to which he has unlawfully and forcibly gained entry would constitute a raw injustice. *See State v. Arias*, 283 N.J. Super. 269, 277-81 (Law Div. 1992) (although he had standing to bring a motion to suppress, defendant "ha[d] no reasonable expectation of privacy in effects left in a home that he commandeered at gunpoint"); *see also State v. Lugo*, 249 N.J. Super. 565, 568 (App. Div. 1991). No "general social norm" would countenance such an expectation on the part of an intruder, and we cannot conceive of how such a claim could possibly be construed as "reasonable." While we recognize that our holding is somewhat in tension with the rationale underlying Alston, it is plain that our Supreme court did not intend that decision to create a safe haven for criminally inclined trespassers.

Affirmed.

APPENDIX C

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : UNION COUNTY

(CRIMINAL)

INDICTMENT NO. 93-7-00922
APP. DIV. DKT. NO.

STATE OF NEW JERSEY:

v. : Transcript of
SHAWN SMITH, : Proceedings

Defendant. :

x

DATE: October 4, 1994
PLACE: Union County Courthouse
Elizabeth, New Jersey

B E F 0 R E:

THE HONORABLE WILLIAM L'E. WERTHEIMER, J.S.C.

TRANSCRIPT ORDERED BY:

LISA A. LYNCH, OFFICE OF THE PUBLIC DEFENDER

APPEARANCES:

ALAN J. SILVER, ASSISTANT PROSECUTOR
FOR THE STATE

WAYNE MORSE, ASSISTANT DEPUTY PUBLIC DEFENDER FOR THE DEFENDANT

THE COURT: This matter comes before the Court on a motion to suppress filed by the defendant, Shawn Smith, pursuant to Rule 3:5-7. The defendant seeks to suppress one key found on the defendant's person and 59 vials of CDS seized from the apartment of Stacy Walker by the police without a warrant on February 23, 1993.

The State contends on that date Detective Hilongos of the Elizabeth Police Department's Narcotics Bureau received a call from a confidential informant who had proved reliable one time in the past provided the following information:

One, black male with a yellow cap and three quarter-length black jacket was selling CDS in the lobby of 400 Irvington Avenue.

Two, suspect took orders in the lobby of 400 Irvington and then went to apartment 2L to get the drugs.

Three, the suspect was "using" a red, two-door Datsun license number H1033D parked across from 400 Irvington Avenue.

Twenty minutes later at 3:40 p.m. Detective Hilongos and several other officers went to 400 Irvington Avenue to detain the defendant who fit the description. The defendant was then searched and a set of keys were found on him. The defendant was found at the time by the detectives outside of 400 Irvington Avenue approximately 60 feet from the lobby.

After this search Detective Hilongos, other officers and Kathy Ryan, the manager of the apartment complex, went to 2L. They found no one to be home. The next door neighbor, Andrea Smith, then came up to the officers and said she was

the sister of Stacy Walker, who rented 2L. She said Walker was in the hospital at the time and Smith called her there.

The State then contends that Walker gave consent over the telephone to Ryan and the police officers to search the apartment with the building manager and her sister as witnesses. While Detective Hilongos did not remember if he advised Miss Walker of her right to refuse to allow the search, Stacy Walker herself said that both Kathy Ryan and Hilongos did so advise her. However, she says Kathy Ryan also said that if she did not permit the search, the police would get a search warrant and she would be responsible for any damage caused as a result.

Stacy Walker was obviously upset and somewhat hysterical when originally called as she only gave permission to Andrea Smith and Patricia Wright to enter the apartment in her absence. In fact one or both of them were taking care of her -- Walker's child or children and needed to go in the apartment from time to time for supplies. The defendant, however, was not given permission by Stacy Walker to enter the apartment and, according to the testimony of Andrea Smith, had forcibly taken the key from her because he said he "needed" to get into Stacy Walker's apartment.

After being assured by Kathy Ryan that she would not be evicted if drugs were found in her apartment, Stacy Walker gave permission to enter her apartment. She says that permission was so that the police could get the defendant's wallet. No other witnesses placed a restriction on the search.

The defense contends that the key was improperly seized from defendant and that defendant could not have been arrested without this key because there was no nexus to the defendant and the apartment without it. The State responds that the key would have been inevitably discovered because Stacy Walker gave consent and Kathy Ryan would have used

a master key to enter. When the drugs were discovered, the defendant was placed under arrest -- strike that.

When the drugs were discovered, the defendant would have been arrested as the tip would have been corroborated and the key would have been found at a lawful search incident to the arrest. The State concedes that other than seeing a man dressed as indicated in the tip, the police did nothing to corroborate any other information because it was "not feasible".

Insofar as the consent to search is concerned, the defendant claims that the ill, pregnant and upset Stacy Walker had her will overborne and that the police lied when they said they were only going to search for defendant's wallet. If that were true, defendant contends, they had no right to look in the refrigerator where 59 vials of cocaine were found. The State concedes if the police said they were looking for a wallet, Stacy Walker would have been tricked and the search would not be voluntary.

Finally, the State claims the defendant had no reasonable expectation of privacy in the apartment because he was a trespasser, if not a burglar, and used the apartment for his stash location.

They refer to *State v. Lugo* at 249 N.J. Super., 565 (App. Div. 1991). However, that search was permissible because police were held to have a right to conduct a warrantless search in the first place. That, however, is the precise issue before this Court. Did the police have a right to conduct a warrantless search. So *Lugo* is distinguishable from the facts of this case.

As stated yesterday, the seizure of the key by the police officer was improper. *State v. Foreshaw*, 245 Super. 166, an Appellate Division decision by Presiding Judge Herman Michels, which held in a case involving a confidential

informant that probable cause only arose when the police conducted their own investigation and it verified the informant's data. The events that the police witnessed corroborated much of the informant's information and the police could then properly use that information as a basis for probable cause to search the defendant's, in that case, automobile for the drugs.

In that case the informant gave the police officers detailed information regarding the suspects and their vehicle. Subsequent investigation by the officers revealed that the informant was correct down to the smallest detail. No such activity occurring here in the case *sub judice*.

In *Foreshaw* it was clear that on the strength of the informant's data and their own follow-up investigation the police officers had probable cause to believe that the contraband was present int he defendant's vehicle. This case dealt with a confidential informant whose inherent reliability ad not been shown.

Here, too, we have an informant who had only been used one time before and while that information proved accurate, this Court cannot conclude that such an individual was "inherently reliable" because the word "inherent" contemplates something intrinsic, something firmly fixed and a single act cannot command such a conclusion. Thus, the seizure of the key was improper.

The next question is -- and I incorporate here by reference my statements of yesterday's record with regard to that issue.

The next question is could the police have detained the defendant thereafter and sought the consent and was consent properly obtained. We know as a result of Judge Brody's decision in *State v. Alexander* at 191 N.J. Super 573 (App. Div. 1983) that the police may arrest only if they have probable cause. They may stop for brief investigatory

questioning if they have an articulable and reasonable basis for suspicion and they may make an inquiry without any grounds for suspicion. A single encounter may escalate from an inquiry to a stop to an arrest.

The situation here was clearly more than an inquiry. This is clearly more than a request for identification. There is a serious question whether the police had the right to stop the defendant in the *Alexander* case. However, arguably based on the clothing description alone, the police had the right to stop the defendant for a brief investigatory questioning because the police certainly had a duty to investigate complaints of criminal behavior.

Clearly, the police have a right to stop a person on the street for summary circumstances that are so highly suspicious as to call for an inquiry. *State v. Dilley*, 49 New Jersey 460 (1967). The legality of incidental street detention for purposes of summary inquiry does not turn on whether it is formally labeled as an arrest or whether it was reasonable in light of the circumstances. *Dilley, supra.*

Here the police had an articulable, reasonable basis for suspicion because, although not probable cause perhaps, because of the information form the confidential informant. They could articulate the reason for their suspicion and it was reasonable under the circumstances. The defendant's detention up to 30 minutes at most in this Court's opinion was not such a significant intrusion as to his freedom so as to violate his constitutional rights.

We now turn to consent. It is axiomatic that if the State relies on consent as the basis for search, it must demonstrate knowledge on the part of the person involved that he had a choice in the matter. *State vs. Johnson*, 68 New Jersey 349, 354, 1975 decision by the Supreme Court cited also by *State v. Bins*, 222 N.J. Super. 583 (App. Div. 1988). Bins seems

to intimate that the consent must be a knowing, voluntary consent free of coercion.

Inquiry by this Court revealed that while Stacy Walker may have felt the danger of eviction if she had refused, she was more concerned about how the defendant got a key to her apartment. She was told she could refuse by both Kathy Ryan and the police but regardless of both told her or not clearly someone did and she, therefore, knew she had a choice of refusal. Inquiry by this Court also revealed that she gave a knowing and voluntary consent to search. The indicated that herself.

This Court further finds that the scope was not limited to finding a wallet. Stacy Walker was sick and confused at the time. Not to the extent she could not have made a knowing, voluntary decision but certainly to the extent that she may not be the best historian of all the little facts on the date in question.

Kathy Ryan would have used her master key if Stacy Walker's key was not available. We know that from the testimony of Kathy Ryan. Therefore, the use of the suppressed key is of no moment.

Further, this Court holds that defendant, a trespasser and probably a burglar in the strict sense, had no reasonable expectation of privacy in anything he brought into Stacy Walker's apartment which he illegally entered.

Judge Charles E. Moylan, Jr., a giant in search and seizure law and lecturer at New Jersey Judicial college, notes a search involves a privacy interest that occurs when there is an expectation of privacy that society is prepared to consider reasonable if infringed.

This Court is not prepared to state that society would consider that defendant had a reasonable privacy interest in

contraband which he brought into an apartment that he had no right to enter or be in and that no one under such circumstances has a reasonable expectation of privacy. For those reasons the motion to suppress the cocaine is denied....

MR. MORSE: Judge, so I understand, the motion to suppress the cocaine was denied. The key is suppressed?

THE COURT: Yes.

MR. MORSE: We are ready to proceed.

MR. SILVER: Did your Honor address the inevitable discovery?

THE COURT: I did indicate it would have been inevitably discovered anyway. I indicated that because of Kathy Ryan's master key could have been used.

MR. SILVER: But as to the key being discovered in a search incident to arrest, did the address that?

THE COURT: No, I didn't address that. You're right. With regard to the issue of the key, the State has contended that it would have been inevitably discovered at a search incident to a lawful arrest.

The inevitable discovery doctrine was discussed in detail in *State v. Sugar*, 108 New Jersey 151, 156, a 1987 decision by the New Jersey Supreme Court which held that the prosecution must prove by clear and convincing evidence, one, that proper, normal and specific investigatory procedures would have been pursued in order to complete investigation of the case.

Two, that under all the surrounding circumstances the pursuit of these procedures would have been inevitably discovered in result of the evidence and, three, discovery

would have occurred wholly independent of discovery of such evidence by unlawful means.

Having held that the detention of the defendant at the scene was proper under the totality of the circumstances and having concluded that the State had received information that the defendant had used that apartment and that once the State was properly in the apartment as a result of the consent given by the apartment dweller and once the cocaine was found, the defendant would and was in fact arrested on the scene as to a lawful arrest and the defendant would have been searched and inventory taken of all the items on his possession and the key would have then been found.

This would have been accomplished through proper, normal, specific investigatory procedures and would have resulted in the inevitable discovery of the key. While the key was improperly taken from the defendant originally, its inevitable discovery allows evidence of its being during the course of this trial.

MR. MORSE: Judge, can I just for purposes -- potential purposes of appeal I have an issue -- I ask the Court for an issue of clarification on the last point.

THE COURT: Yes.

MR. MORSE: The inevitable discovery.

THE COURT: Yes.

MR. MORSE: Your Honor ruled that the key was illegally ---

THE COURT: Originally.

MR. MORSE: -- illegally seized and there was a lot of testimony in this motion concerning how Mr. Smith came into

possession of the key, which I would submit to the Court had not the key been illegally seized, none of that testimony would have been brought before the Court. So I am just curious for purposes of a probable cause determination if the police have a tip, we would have been left with -- if the police had acted properly, they would have detained Mr. Smith. They wouldn't have known that he had a key. They would have sought consent from Miss Walker. Drugs would have been found in the apartment. Mr. Smith has never been seen anywhere near the apartment.

THE COURT: Well, no. See, what would happen is that would have been more detailed corroboration of the informant's tip. They did have corroboration to a degree. They had the yellow hat and three quarter-length coat and he was also in the area where the informant said he would be, although in the in the lobby area. The informant also said that he used apartment 2L to make the sales. So that going into 2L and finding a stash of cocaine would have been a detail corroboration of the informant's tip and thereby permit the police action as indicated.

MR. MORSE: That would have given the police probable cause to arrest?

THE COURT: Absolutely.

MR. MORSE: Okay. Thank you, Judge.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1998

No. 98-593

FILED
OCT 28 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

STATE OF NEW JERSEY,

Petitioner,

v.

SHAWN SMITH,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, Shawn Smith, asks leave to file the attached Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of New Jersey, without prepayment of costs and to proceed in forma pauperis pursuant to Rule 39. Petitioner has previously been found to qualify for the services of the Office of the Public Defender at every stage of the proceedings in the courts of the State of New Jersey.

Petitioner's affidavit in support of this motion is attached hereto.

IVELISSE TORRES
Public Defender of New Jersey

BY: Mark H. Friedman
MARK H. FRIEDMAN
Assistant Deputy Public Defender

Counsel for Respondent

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1998

No. 98-593

STATE OF NEW JERSEY

Petitioner,

v.

SHAWN SMITH,

Respondent.

AFFIDAVIT

I, Shawn Smith, being duly sworn according to law, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs to give security therefore, I state that because of my poverty I am unable to pay the costs of said case or to give security therefore; and that I believe I am entitled to the redress I seek in this case.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of proceeding in this Court are true.

1. Are you presently employed?

A. No

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest,

dividends or other source?

A. No

3. Do you own any cash or checking or savings account?

A. No

4. Do you own any real estate, stocks, bonds, notes, automobiles or other value property (excluding ordinary household furnishings and clothing)?

A. No

5. List the persons who are dependent upon you for support and state your relationship to those persons.

A. Sheronica Tynes 7 YEARS (Daughter

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Shawn Smith

SHAWN SMITH

Subscribed and Sworn to before

me this 21st day of October, 1998.

Robert Hasanoddin

ROBERT H. HASANODDIN

MY COMMISSION EXPIRES

27 Sept 2001

No. 98-593

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

STATE OF NEW JERSEY, Petitioner,

v.

SHAWN SMITH, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

MARK H. FRIEDMAN
Assistant Deputy
Public Defender
(Counsel of Record)

IVELISSE TORRES
Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street
Newark, New Jersey 07101
(973) 877-1200
Counsel for Respondent

QUESTION PRESENTED

Whether the Supreme Court of New Jersey's fact-specific ruling that a confidential informant's tip, together with some corroboration of the information contained in the tip, did not establish probable cause to justify the search of defendant's person, decided pursuant to a completely literal application of the "totality of circumstances" test set forth in Illinois v. Gates, 462 U.S. 213 (1983), presents any question of sufficient general importance to justify the granting of certiorari?

PARTIES BELOW

Respondent concurs with the statements set forth in the petition.

TABLE OF CONTENTS

	PAGE NOS.
QUESTION PRESENTED	i
PARTIES BELOW	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
CONCLUSION	17

TABLE OF AUTHORITIES

PAGE NOS.

Cases

Aguilar v. Texas, 378 U.S. 108 (1984) 9

Draper v. United States, 358 U.S. 307 (1959) 13

Illinois v. Gates, 462 U.S. 213 (1983) . . . . 3-6, 8, 12, 15, i

Jefferson v. United States, 476 A.2d 685 (C.A.D.C. 1984) 14

Mincey v. Arizona, 437 U.S. 385 (1978) 16

Ornelas v. United States, 517 U.S. 690 (1996) 12

Pattman v. State, 431 S.E.2d 706 (Ga. App. 1993) 13

People v. Darden, 34 N.Y.2d 177, 313 N.E.2d 49 (1974) 13

Richards v. Wisconsin, 520 U.S. 385, 117 S.Ct. 1416 (1997) 15, 16

Spinelli v. United States, 393 U.S. 410 (1969) 9

State v. Bell, 482 So.2d 11 (La. App. 1985) 13

State v. Butler, 655 So.2d 1123 (Fla. 1995) 14

State v. Hasenbank, 425 A.2d 1330 (Me. 1981) 14

State v. Richards, 201 Wis.2d 839, 549 N.W.2d 218 (1996) 15

State v. Robinson, 342 So.2d 183 (La. 1977) 14

State v. Ruffin, 448 So.2d 1274 (La. 1984) 14

State v. Smith, 155 N.J. 83, 713 A.2d 1033 (1998) 1, 4

State v. Zutic, 155 N.J. 103, 713 A.2d 1043 (1998) 4, 5, 7

Cases (cont.)

Thomas v. State, 208 Ga. App. 476, 430 S.E.2d 849 (1993) 13

Turner v. United States, 588 A.2d 280 (C.A.D.C. 1991) 14

United State v. Rucker, 138 F.3d 697 (7th Cir. 1998) 13

United State v. White, 648 F.2d 29 (D.C. Cir. 1981), cert. den. 454 U.S. 924 (1981) 15

United States v. Abadie, 879 F.2d 1260 (5th Cir. 1989) 13

United States v. Ayers, 924 F.2d 1468 (9th Cir. 1991) 14

United States v. Lincoln, 992 F.2d 356 (D.C. Cir. 1992) 13

United States v. Marbury, 732 F.2d 390 (5th Cir. 1984) 13

Wilson v. Arkansas, 514 U.S. 927 (1995) 15

Ybarra v. Illinois, 444 U.S. 85 (1979) 12

Statutes

28 U.S.C. 1257(a) 1

Respondent, Shawn Smith, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the opinion of the Supreme Court of New Jersey in State v. Smith, 155 N.J. 83, 713 A.2d 1033 (1998).

OPINIONS BELOW

Respondent concurs with the statements set forth in the petition.

JURISDICTION

Jurisdiction of this Court to review the judgment of the Supreme Court of New Jersey is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Respondent concurs with the statements set forth in the petition.

STATEMENT OF THE CASE[1]

The only "undisputed facts" in this case can be found in the opinion of the New Jersey Supreme Court in Smith, 155 N.J. at 88-91 (Pa 2 to 5). Respondent concurs with the statement of the case in the petition (P 3 to 7) insofar as it reflects that opinion, but we add the following pertinent facts:

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[1] "P ___" will refer to the petition for certiorari. "Pa ___" will refer to the appendix to the petition. Since Appendix C of the petition (Pa 32 to 41) contains only the text of the trial court's ruling on the motion to suppress and omits all of the testimony and the arguments that preceded it, respondent will use the citation form from the state court briefs to refer to the testimonial hearing of October 3, 1994 ("T ___") and the arguments that preceded the trial court's ruling on October 4, 1994 ("P ___") when it becomes necessary to refer to those proceedings.

Contrary to petitioner's suggestion (P 3), it is not an "undisputed fact" that the "black male wearing a three quarter length jacket and a yellow cap" was "selling the drugs as [the informant] spoke [to Detective Hilongos]." While Hilongos did indeed testify that the informant "was saying at that time he was selling narcotics" (T 5-11 to 15), he testified immediately before this that the informant had not told him "at what period of time Shawn Smith had been selling" (T 5-3 to 10). Although the Appellate Division's opinion hazarded the guess that "the gist of the conversation was that the drug transactions were taking place while the informant was talking and that the informant was actually witnessing the illegal sales" (Pa 20), the facts are that neither the New Jersey Supreme Court (Pa 2) nor the trial court (Pa 33) found as a fact that the suspect was in fact "selling the drugs as they spoke."

Petitioner correctly states that the trial court ruled that "the initial seizure of the keys from defendant's person [was] an unlawful search [but] found that the keys would have been inevitably discovered..." (P 5). Petitioner fails to mention that the prosecutor who represented the State in the trial court conceded on two occasions that "the officer didn't have probable cause to search the defendant at the time of the initial stop" (T 20-19 and 78-22 to 23), and that the claim that he did have probable cause to arrest defendant was not made until the case was appealed. Respondent raised the issue of whether the petitioner should be held to this concession throughout the

course of the appeal, but the New Jersey Supreme Court did not address it, preferring to reverse on the merits.

Finally, petitioner's statement that the New Jersey Supreme Court held that the information possessed by the police was "insufficient to satisfy the totality of the circumstances test and establish probable cause justifying the warrantless arrest of defendant" (P 6, emphasis added) is not quite accurate. In fact, the Court ruled that petitioner could not rely on the "search incident to arrest" doctrine to uphold the police action because there was "no evidence that Hilongos had a subjective intent to arrest Smith when he stopped and subjected him to a search" (Pa 6). What the Court actually ruled was that under the totality of the circumstances test enunciated by this Court in Illinois v. Gates, 462 U.S. 213 (1983), "Hilongos did not have probable cause when he searched defendant" (Pa 6 and 14).

REASONS FOR DENYING THE WRIT

Petitioner's arguments are nothing more than an ill-disguised attempt to transform a conventional, completely fact-specific application of the Gates test into a constitutional controversy. From the outset, the New Jersey Supreme Court made it clear that the "specific issue [in this case] is whether a confidential informant's tip, together with some corroboration of the information contained in the tip, established probable cause to justify the search of defendant's person" (Pa 2). That the Court intended to perform the modest task of applying Gates to specific factual contexts is made evident in the summary of their

analysis set forth in State v. Zutic, 155 N.J. 103, 110-111, 713 A.2d 1043 (1998), the companion case to Smith:

> We begin with a brief recapitulation of the analysis of the totality of the circumstances. Hearsay may constitute probative evidence of probable cause "so long as a substantial basis for crediting the hearsay is presented." [Citations omitted]. An informant's "veracity" and "basis of knowledge" are two highly relevant factors under the totality of circumstances. [Citations omitted]. A deficiency in one of those factors "may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." [Citations omitted]. An informant's veracity may be established in a variety of ways..For example, the informant's past reliability will contribute to the informant's veracity. {Citations omitted]. With regard to the informant's basis of knowledge, if the informant does not identify the basis of knowledge, a reliable basis of knowledge may nonetheless be inferred from the level of detail and amount of hard-to-know information disclosed in the tip. Smith, supra, 155 N.J. at 95, 713 A.2d 1039 [Pa 9]. Finally, independent corroboration of hard-to-know detail in the informant's tip may also greatly bolster the tip's reliability. Id. at 95, 713 A.2d 1040 [Pa 10].

The application of the Gates test to the facts of this case also did not break any new ground, and was never intended to (Pa 14 to 15):

> In sum, we conclude that in the totality of the circumstances, Hilongos did not have probable cause when he searched defendant. although the informant's veracity is bolstered by one prior occasion of reliability, doubts concerning potential ulterior motives must remain. Also, the easy-to-know detail in the tip did not imply a reliable basis of knowledge. Finally, the police corroboration of that easy-to-predict detail did not bolster the informant's reliability

> in respect of the allegation of criminal activity. Taken as a whole, these circumstances did not amount to probable cause. Therefore, the personal search of defendant and seizure of the keys from defendant were unlawful.

In the face of the New Jersey Supreme Court's repeated insistence that it recognized and applied the doctrine that "the sufficiency of the information related by an informant as a basis for establishing probable cause is determined by a standard that calls for consideration and analysis of all relevant circumstances" (Pa 7), petitioner futilely tries to conjure up a constitutional issue worthy of this Court's consideration by ripping isolated sentences or even mere phrases out of context to cobble together "a dramatic departure from the flexible 'totality of the circumstances' approach [of Gates]" (P 8) that was never accomplished or even intended. Once the language petitioner relies on to give the appearance of "important law enforcement issues" (P 7) are restored to their proper context, it becomes evident that this Court is presented with nothing more than a "probable cause determination ... governed by the totality of circumstances test from ... Gates...." Zutic, 155 N.J. at 110.

Petitioner's first claim is that the New Jersey Supreme Court "asserts that corroboration is an independent prong which must be satisfied in each case" and thus "ignored [a] fundamental aspect of this flexible test" (P 10). The only portions of the opinion below that petitioner can point to as support for this sweeping assertion are isolated sentences in which the Court said that "corroboration is an essential part of the determination of

probable cause. Independent corroboration is necessary to ratify the informant's veracity and validate the truthfulness of the tip" (Pa 10). When read in the context of the entire opinion, however, it is evident that the key words in that quote are not "essential" or "necessary," but, rather, are "the determination of probable cause." What the Court was saying was not that corroboration had to be present in every case in order for it to find probable cause, but that the presence and quality of the corroboration had to be considered when applying the "totality of circumstances" test. The Court made this clear later in the opinion when it discussed the facts of the instant case (Pa 13, emphasis added):

> The evidentiary weakness of the basis-of-knowledge factor under the totality of the circumstances test goes only to the weight and does not as such necessarily establish the absence of probable cause. Even where the tip lacks sufficient detail to establish a basis of knowledge, independent police investigation and corroboration of the detail in the tip must be considered because it may in some circumstances add to the evidentiary weight of facts as well as the overall circumstances.

This approach to the importance of including corroborating information in the overall "totality of the circumstances" test is the mirror image of this Court's own opinion in Gates, 462 U.S. at 241, that "[o]ur decisions applying the totality-of-the-circumstances analysis ... have consistently recognized the value of corroboration of details of an informant's tip by independent police work."

Contrary to the image that petitioner is trying to convey, the New Jersey Supreme Court did not hold the search of respondent invalid because it was devoid of any corroboration. The very first paragraph of the opinion acknowledges that there was "some corroboration of the information contained in the tip" (Pa 2), but after careful analysis it ultimately concluded that "corroboration only of the suspect's description and location did not bolster the tip's reliability or add to its weight" (Pa 13). That petitioner does not agree with this analysis is no justification for the misleading characterization of the New Jersey Supreme Court's holding as being "that corroboration of an informant's tip is a per se requirement to establish probable cause" (P 10).

Nor is it in any way accurate for petitioner to assert that the Court below held "that such corroboration cannot be of innocent details, but is restricted to suspicious actions" (P 13 and 15). Again, petitioner's evidence is a single quotation, taken out of context, that noted that "the police corroboration did not include the observation of any suspicious drug transaction or criminal activity," along with a similar reference to "suspicious detail" in Zutic, 713 A.2d at 1048 (P 12). Neither in these quotes nor in any other portion of the opinions below can an unbiased reader find any disagreement that "corroboration of innocent details can help to establish probable cause" (P 13). What the Court below was saying in the sentences quoted by petitioner, as it was saying throughout the opinion, was that

corroboration of easy-to-know detail like clothing or past movements cannot alone corroborate the claim that a suspect is engaging in criminal activity:

> The police corroboration only of the suspects's description and location did not bolster the tip's reliability or add to its weight. The informant could have easily known defendant's description and location without being privy to criminal activity, and police corroboration of that neutral information does not alone or with all the surrounding circumstances suggest that defendant was engaged in criminal activity.

(Pa 13 to 14, emphasis added). The New Jersey Supreme Court's belief that it is "police corroboration of hard-to-know predictive detail" that generates "a strong inference that the informant was not fabricating the story" once again mirrors this Court's belief that corroboration under the "totality of circumstances" test should include "details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of the parties ordinarily not easily predicted." Gates, 462 U.S. at 245.

Petitioner also pounces on the New Jersey Supreme Court's isolated comments that "a few past instances of reliability do not conclusively establish an informant's reliability" (Pa 8) and that "without more information relating to the informant's history or motives, the information does not firmly establish his truthfulness in this case" (Pa 11) as the excuse for arguing that the Court below "indicated that the degree of evidence concerning the reliability of an informant is now more demanding" than that ordinarily considered sufficient under Gates and its progeny (P

17 to 18). Once again, examination of the Court below's analysis of the "veracity" factor to the facts of the case at bar reveals a straightforward application of the "totality of circumstances" test with full appreciation of its flexible nature:

> In applying this analysis to the facts of this case, we may conclude that there was some evidence of the informant's veracity. Hilongos stated he believed the informant to be reliable because "[h]e did a job for me in the past." Under Aguilar/Spinelli,[2] a single instance of past reliability would have been sufficient evidence of the veracity factor. [Citations omitted]. However, under the totality of the circumstances test, we must determine how much weight to give the informant's veracity in reaching the ultimate determination of probable cause. As to its weight, the recitation in the tip reveals little about Hilongos's informant other than that the informant had been reliable once previously in a case that led to a conviction. [Citation omitted]. While that information increases the likelihood that the informant was being truthful and possessed the necessary veracity, without more information relating to the informant's history or motives, the information does not firmly establish his truthfulness in this case.

(Pa 11, emphasis added). In other words, the New Jersey Supreme Court has recognized that establishing "veracity" does not per se "conclusively establish" the reliability of the tip (Pa 8) under the "totality of the circumstances" test if the "basis of knowledge" disclosed in the tip is "such that it can be readily inferred that the informant was not an insider or a person especially close to defendant or directly aware of the criminal activities ascribed to defendant" (Pa 12) and when the only

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[2] Aguilar v. Texas, 378 U.S. 108 (1984); Spinelli v. United States, 393 U.S. 410 (1969).

corroboration of the tip was that "the police only briefly observed defendant standing alone outside the building" (Pa 13). Such an all-encompassing evaluation of all of the facts is far more faithful to the "totality of the circumstance" test than is petitioner's apparent belief that to establish an informant's "veracity" is to establish a tip's "reliability" without any further proof being necessary.

Asking this Court to act as a court of errors that reviews factual disputes, petitioner claims that the "existence of probable cause to arrest defendant ... was nothing less than patent" (P 19) and that this Court should "affirm the Appellate Division's unanimous finding of probable cause to arrest defendant and to conduct a search of his person incident to his arrest" (P 20). If this represents petitioner's best effort to convince this Court that the instant matter is a fitting vehicle for examination of so-called "important law enforcement issues" (P 7), than it must be dismissed as a failure because it ignores critical facts found by the courts below and invents others more to petitioner's liking. First, so far from "patent" was the existence of probable cause to arrest in this matter that petitioner's own representative in the trial court conceded on two occasions that it had not been established (T 20-19 and 78-22 to 23). Second, although the New Jersey Supreme Court recognized that "probable cause to arrest is the functional equivalent of probable cause to search," it found that the search of respondent could not be justified under a "search incident to arrest" theory

because "[t]here is no evidence that Hilongos had a subjective intent to arrest [respondent] when he stopped and subjected him to a search" (Pa 6). Third, no court in a position to decide the facts ever found that the police had corroborated the informant's claim that respondent was "located at 400 Irvington Avenue," or that he was "apparently using the lobby of that building," or that he was "using a red two-door Datsun" (P 19). Instead, the New Jersey Supreme Court either made or endorsed findings that completely gut petitioner's claim that probable cause to either search or arrest respondent ever existed:

> The police corroborated defendant's description and approximate location, but the evidence does not support the finding that they corroborated the modus operandi or the use of the Datsun. When making its factual findings, the trial court acknowledged, "The State concedes that other than seeing a man dressed as indicated in the tip, the police did nothing to corroborate any other information because it was 'not feasible.'" That finding is supported by the record. To the extent that the tip described a modus operandi, it alleged that the suspect would be meeting with people and going back and forth between the lobby and apartment #2L. Rather than corroborate that information, the police only briefly observed defendant standing alone outside the building. Also, Hilongos testified that he could not remember if he saw the Datsun before or after he searched defendant. Moreover, the police corroboration did not include the observation of any suspicious drug transaction or criminal activity. The police corroboration only of the suspects description and location did not bolster the tip's reliability or add to its weight.

(Pa 13). The above-quoted findings must be accepted by this Court because "a reviewing court should take care both to review

findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers."[3] Ornelas v. United States, 517 U.S. 690, 699 (1996).

The smattering of out-of-state cases relied on by petitioner to support the claim that an informant's tip can ripen into probable cause for a search and/or arrest simply by police observations of clothing that matches the informant's description (P 22 to 23) does nothing more than validate this Court's belief "that because the mosaic which is analyzed for a ... probable-cause inquiry is multi-faceted, 'one determination will seldom be a useful "precedent" for another...." Ornelas, 517 U.S. at 696, quoting from Gates, 462 U.S. at 238 n. 11. The cases cited all have two factors that rendered those informants' "basis of knowledge" far more convincing than that in the case at bar.

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[3] Petitioner criticizes the New Jersey Supreme Court for supposedly "ignor[ing] the testimony of Detective Hilongos that he knew the neighborhood, and that very building, to be rife with drug sales" (P 20 n. 5). It is petitioner, however, who conveniently ignores that Court's finding that "there was no suggestion that Hilongos used his experience to infer that defendant was selling drugs. The only observation Hilongos made was of defendant standing on the sidewalk wearing a coat and a yellow cap. His experience did not lead him to believe that such a person was engaged in criminal activity" (Pa 14). Furthermore, to allow Hilongos' past experiences in Oakwood Terrace to serve as corroboration for a tip involving a person whom he did not know even lived in that complex or building would fly in the face of this Court's long-standing view that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. [Citation omitted]. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person." Ybarra v. Illinois, 444 U.S. 85, 90 (1979).

First, the informants accurately reported that the suspects were carrying the drugs on their persons or in automobiles in which they were travelling; and second, the suspects were promptly discovered by the police in exactly the location that the informants said they would be.[4] They also feature informants

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[4] United State v. Rucker, 138 F.3d 697, 700-701 (7th Cir. 1998) (Officer, who knew defendant and his criminal history, acted on reliable informant's tip when the "modus operandi (carrying the drugs in an oversized shoe) described to him by the informant was the modus operandi used by Mr. Rucker in his earlier encounter with the police...."); United States v. Lincoln, 992 F.2d 356, 357-358 (D.C. Cir. 1992) ("reliable informant's detailed and corroborated reports" about car, its occupants, and the name on the vehicle registration, coupled with furtive gestures by the suspects); United States v. Abadie, 879 F.2d 1260, 1263 (5th Cir. 1989) (detailed description "of how the drug transaction would be handled" from active undercover informant, with corroboration of individual's appearance, vehicle, future movements, and bag in which cocaine was found). United States v. Marbury, 732 F.2d 390, 397-398 (5th Cir. 1984) (affidavit for warrant to search for stolen vehicles passes muster "by the barest of margins" because a "second tip" from an informant corroborated "first tip" by "a citizen who is known to affiant to be reliable and honest"); Thomas v. State, 208 Ga. App. 476, 430 S.E.2d 849, 851 (1993) ("the informant in this case had been reliable on several occasions in the past"); Pattman v. State, 431 S.E.2d 706, 717 (Ga. App. 1993) (informant "had within the prior three weeks provided Officer Graham with information which led to the arrests of five or six persons" for drugs, besides which the officer knew the suspect, who fled when he saw him, by his street name); State v. Bell, 482 So.2d 11, 12-13 (La. App. 1985) (informant had provided the officer with "information which in the past led to 'maybe' ten arrests and 'probably' five convictions [and] the informant had never provided him with any wrong information," coupled with the fact that the suspect made several furtive gestures); People v. Darden, 34 N.Y.2d 177, 313 N.E.2d 49, 51 (1974) (corroboration of reliable informant's prediction of carrier's appearance, attache case, and travel plans comparable to that contained in Draper v. United States, 358 U.S. 307 (1959). In two cases, the reviewing courts did not hold that the police had probable cause for an arrest or search incident to arrest; they held only that the informant's tip plus the description justified an "investigative stop of the black Buick Electra" (State v. Robinson, 342 So.2d 183, 186-188 (La. 1977)) or that the anonymous tip concerning a concealed weapon justified a "limited, pat-down search for the purpose of protecting

(continued...)

whose "track records" greatly exceed that of the person in this case both in quantity and in quality (i.e., specific information regarding narcotics activities as opposed to unrelated crimes).[5] Petitioner's lengthy description (P 21 to 22) of State v. Butler, 655 So.2d 1123, 1130-1131 (Fla. 1995), for example, fails to account for the following language in the case:

> In this case, we have an informant whose veracity (i.e., credibility and reliability) is unquestioned. Officer Putnam had used information from this informant at least 20 times, and 60 to 70% of the tips resulted in felony arrests. As the district court acknowledged, the informant's reliability is "fairly well established" .... We agree there is a "strong showing" in support of the informant's veracity.

Id. at 1130, emphasis added. Since the informant in this case did not have nearly the kind of long-and-strong track record that figured so prominently in these other cases, both the trial court

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[4](...continued)
investigating officers and the public" (State v. Hasenbank, 425 A.2d 1330, 1334 (Me. 1981).

[5] United States v. Ayers, 924 F.2d 1468, 1478 (9th Cir. 1991) ("the affidavit detailed the informant's prior activities in connection with the police, including participating in approximately 15 to 18 controlled buys of contraband under the direction of officers from the Contra Costa County Sheriff's Department and the San Pablo Police Department"); Turner v. United States, 588 A.2d 280 (C.A.D.C. 1991) ("reliable tips on approximately ten occasions which resulted in three 'good' search warrants and several arrests"); Jefferson v. United States, 476 A.2d 685, 687 (C.A.D.C. 1984) ("information on at least nine occasions, and on each of these occasions the information led to the arrest and the recovery of narcotics"); But see State v. Ruffin, 448 So.2d 1274, 1278-1279 (La. 1984) (informant's track record of "supplying credible information leading to over fifty arrests resulting in thirty to forty conviction" not enough to justify warrantless arrest when only corroboration of tip was that suspect was standing on the corner where informant said he would be found).

and the New Jersey Supreme Court had the right to insist on a commensurately stronger showing of corroboration of the informant's tip before finding that this "deficiency [in the informant's relative reliability was] compensated for" sufficiently to find that probable cause had been established. Gates, 462 U.S. at 233.

Finally, realizing that all else has probably failed, petitioner uses the conclusion of the petition to make an emotional appeal implying that this Court would be less than "serious about enforcing drug trafficking laws" unless it rules that the "war on drugs" so overwhelms the rights of citizens under the United States Constitution that it requires that police be given virtual carte blanche to search or seize anyone who seems to be the subject of a tip as long as the informant has provided any useful information in the past, no matter how generic the informant's description or how otherwise lawful the suspect's conduct may appear to be (P. 24, quoting from United State v. White, 648 F.2d 29, 43-44 (D.C. Cir. 1981), cert. den. 454 U.S. 924 (1981)). Thankfully, this Court has already acknowledged that petitioner's theory is abhorrent in a free and civilized society. In Richards v. Wisconsin, 520 U.S. 385, 117 S.Ct. 1416 (1997), this Court reviewed a decision by the Wisconsin Supreme Court that created a blanket exception to the "knock-and-announce" rule of Wilson v. Arkansas, 514 U.S. 927 (1995) for felony drug investigations. See State v. Richards, 201 Wis.2d 839, 549 N.W.2d 218 (1996). The Court rejected such a

blanket exception because it "contains considerable overgeneralization" and because the "reasons for crating an exception in one category can, relatively easily, be applied to others." Richards, 117 S.Ct. at 1421; see also Mincey v. Arizona, 437 U.S. 385 (1978) (rejecting a blanket exception to the exclusionary rule for warrantless investigations of murder scenes). Petitioner's attempt to raise "the critical role played by informants in crime detection" above all competing considerations makes the following portion of Richards more relevant than ever:

> It is always somewhat dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment. The purpose of the Fourth Amendment's requirement of reasonableness "is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted -- even if a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable.'" Minnesota v. Dickerson, 508 U.S. 366, 380...(1993) (SCALIA, J., concurring).

117 S.Ct. at 1421 n. 4. In summary, no valid reason exists either in fact or law to justify this Court's consideration of the instant case.

CONCLUSION

For all the aforementioned reasons, it is respectfully urged that petitioner has failed to raise any substantial constitutional questions, and, therefore, that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

IVELISSE TORRES
Public Defender
Attorney for Respondent

BY: Mark H. Friedman
MARK H. FRIEDMAN
Assistant Deputy Public Defender

Of Counsel and On the Brief

Dated: October 27, 1998